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80-1315

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

STATE OF HAWAII, STATE OF VERMONT, STATE OF DELAWARE and STATE OF ALASKA,
Petitioners,

vs.

WILLIAM K. MEDERIOS, PETER M. K. LONO, GEORGE SHIMABUKU, ROY J. GIROUARD, JOHN K. KILLARY, JOHN E. KASPER, HERBERT WILLIAM LAWRENCE, AUBREY McKAY, CARL V. HENRY, DENNIS RAY ANTHONY and DONALD D. MORGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 5003(a) conditions the authority of federal officials to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system.

2. Whether the transfer of a state prisoner to federal custody, pursuant to 18 U.S.C. § 5003(a), must be preceded by a due-process hearing.

LIST OF PARTIES AFFECTED

The Parties affected by this case, other than those listed in the caption, are George C. Wilkinson, Warden, United States Penitentiary, Marion, Illinois, Robert I. Elsea, Warden, Federal Correctional Institute, Oxford, Wisconsin, and Leo McGill.

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No. _____

In the Supreme Court

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United States

OCTOBER TERM, 1980

STATE OF HAWAII, STATE OF VERMONT, STATE OF DELAWARE and STATE OF ALASKA,
Petitioners,

vs.

WILLIAM K. MEDERIOS, PETER M. K. LONO, GEORGE SHIMABUKU, ROY J. GIROUARD, JOHN K. KILLARY, JOHN E. KASPER, HERBERT WILLIAM LAWRENCE, AUBREY McKAY, CARL V. HENRY, DENNIS RAY ANTHONY and DONALD D. MORGAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, State of Hawaii, State of Vermont, State of Delaware and State of Alaska, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is attached to this Petition as Appendix A.

That decision affirmed the judgments of the United States District Court for the Eastern District of Illinois[1] and the Western District of Wisconsin, which were consolidated on appeal. Copies of the District Court opinions are attached to this Petition as Appendixes D and E, respectively. The Report and Recommendation of the United States Magistrate for the Eastern District of Illinois is attached to this Petition as Appendix C. None of these opinions have been published as of this writing, except *Lawrence v. Elsea,* 478 F.Supp. 480 (W.D. Wis. 1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 23, 1980; the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The majority of the Seventh Circuit *sua sponte* voted against rehearing (Appendix A, at A-3, n.1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1]Subsequent to the filing of the actions below the Eastern District of Illinois was redesignated as the Southern District.

STATUTE INVOLVED

18 U.S.C. § 5003(a), "Custody of State Offenders":

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

STATEMENT OF THE CASE

The Respondents are maximum security prisoners of the Petitioner States. Each was convicted of violent crimes and were transferred from state to federal custody pursuant to contracts between the States and the Federal Bureau of Prisons under 18 U.S.C. § 5003(a). All of the Respondents were significant management problems in their respective states which do not have the facilities, assets, and personnel capable of handling such prisoners. As the Magistrate noted below:

> Since the state correctional systems involved in the case at hand (Delaware, Hawaii, Alaska, Vermont and New Mexico—each relatively small in total population, incarcerating an equally relative small number of the type of inmates in issue) do not have the facilities to properly prevent such activity [i.e., assaults, murders, and escapes], they are constrained to either shackle the inmate or confine the inmate to his cell 24 hours a day, save an occasional 30 minute exercise period. Appendix C, at A-52.

Thus, the transfers were not only for the benefit of society, but for the prisoners' benefit as well.

On July 25, 1978, the Seventh Circuit ruled, in *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978) *(en banc)* (4-3 decision), that § 5003(a) required a predetermination that an inmate requires specialized treatment available only in the federal system before he may be transferred.[2]

As a result of *Lono*, the Respondents filed petitions for writs of habeas corpus alleging that their transfers were invalid. The petitioner States intervened and participated in the proceedings below.

On September 28, 1979, the Honorable Kenneth J. Meyers, Magistrate, issued his Report and Recommendation (Appendix C) which severely criticized, but was constrained to follow, *Lono:*

> This Court would be remiss in its duties, however, if we failed to register its disapproval of the *Lono* holding. We strongly believe that such a decision will not long endure. Appendix C, at A-54.

Magistrate Meyers "recommended with reluctance" that the prisoners be returned to their respective states.

On November 1, 1979, the Honorable James L. Foreman, District Judge, adopted the said Report and Recommendation. *See* Appendix D. He, too, severely criticized but was constrained to follow, *Lono:*

> [T]his Court heartily agrees with Judge Bauer's lucid dissenting opinion in *Lono* and with the subsequent

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[2]The State of Hawaii, which appeared as *amicus curiae* in *Lono*, urged the Solicitor General to seek certiorari. However, for reasons unknown, Hawaii's request was denied.

cases from other circuits flatly rejecting *Lono*. [Citations omitted.] Appendix D, at A-62.

In the Western District of Wisconsin, Judge James E. Doyle, following *Lono*, ordered that prisoner Lawrence be returned to Vermont. *See* Appendix E.

The Petitioner States appealed and argued the matter on May 16, 1980. On December 23, 1980, the United States Court of Appeals for the Seventh Circuit affirmed the lower court decisions. *See* Appendix A.

The Petitioner States now seek a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The prisoner Respondents invoked the jurisdiction of the District Court below by petitions for writs of habeas corpus, pursuant to 28 U.S.C. § 2241.

REASONS FOR GRANTING THE WRIT

I

THE CLOSELY DIVIDED SEVENTH CIRCUIT CONFLICTS WITH EVERY OTHER COURT TO HAVE INTERPRETED § 5003(a) AND WITH NEARLY 30 YEARS OF ADMINISTRATIVE CONSTRUCTION

The Seventh Circuit is in conflict with itself, with every other court to have interpreted § 5003(a) and with nearly 30 years of administrative construction by the Federal Bureau of Prisons.

First, the Seventh Circuit is closely divided. Only four of its seven judges in *Lono* overruled a prior three-judge panel opinion (Appendix F) which found nothing in § 5003(a) as limiting prison official discretion. Further-

more, the reluctantly concurring opinions of Circuit Judges Pell and Bauer in the decision below stated that they "would prefer that this Circuit overrule *Lono en banc.*" Appendix A, at A-32. However, the majority of the circuit "did not favor a rehearing *en banc*" of *Lono*. Appendix A, at A-3 n.1.

Second, every other Circuit Court of Appeal which has ruled on this issue disagrees with the Seventh Circuit. *Sisbarro v. Warden,* 592 F.2d 1 (1st Cir. 1979) (*en banc;* unanimous), *cert. denied,* 444 U.S. 849 (1979); *Howe v. Civiletti,* 625 F.2d 454 (2d Cir. 1980), *cert. granted,* No. 80-5392; and *Beshaw v. Fenton,* ..... F.2d ....., No. 79-1777 (3rd Cir., filed December 15, 1980). In addition, district courts have refused to follow *Lono. E.g., Bowers v. Fenton,* 488 F.Supp. 570 (M.D. Pa. 1979); *Gomes v. Moran,* 468 F.Supp. 542 (D.R.I. 1979), *aff'd* 605 F.2d 27 (1st Cir. 1979); *Fletcher v. Warden,* 467 F.Supp. 777 (D. Kan. 1979); and *Shakur v. Bell,* 447 F. Supp. 958 (S.D.N.Y. 1978).[3]

Finally, the Seventh Circuit conflicts with nearly 30 years of administrative construction by the Bureau of Prisons:

> Moreover, upsetting the Bureau's settled and previously unchallenged administrative construction of the statute now—over 25 years after its enactment—jeopardizes longstanding contractual relationships

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[3]The Fifth Circuit, in *United States ex rel. Gereau v. Henderson,* 526 F.2d 889, 896 (5th Cir. 1976), also ruled that § 5003 leaves the decision to transfer inmates to the "sound discretion of prison officials".

with many states. *Lono, supra* at 649, dissenting opinion of Circuit Judge Bauer.

It is necessary and timely that this question be decided by the United States Supreme Court now. This Court has before it the Petition for Writ of Certiorari, in *Howe v. Civiletti,* No. 80-5392, which presents the identical issue of the proper construction of 18 U.S.C. § 5003(a). The consideration of the *Howe* matter can and should be consolidated with this petition.

Furthermore, it was suggested by the Seventh Circuit and the reluctantly concurring opinions of Circuit Judges Pell and Bauer that the conflict among the circuits be resolved by the Supreme Court. *See* Appendix A.

The Seventh Circuit's conflict with the rest of the nation can and should be remedied at this time by this court. Otherwise, the conflict will continue to impose confusion and frustration on the Federal Bureau of Prisons and every State in the union which has prisoners in federal custody.

II

THE DECISION BELOW INVOLVES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE AND OF PUBLIC IMPORT

A resolution of this case involves matters of national significance and public import.

First, none of the Petitioner States can safely and securely house prisoners such as Respondents. None of the Petitioner States have adequate high security facilities, as further described by Magistrate Meyers in his Report and

Recommendation (Appendix C). Their return would cause severe hardships for each State's prison system.

Second, there are hundreds of state prisoners in federal custody whose status is now in jeopardy due to the decision below. The Petitioner States alone have approximately 290 such inmates. The return of just one inmate to a state poses considerable security risks, and costs thousands of dollars.

Finally, the present split among the circuits will prove harmful to the administration of justice. For example, state prisoners may now be freely transferred to federal prisons outside the Seventh Circuit. This encourages "prison shopping" for the states eager to avoid a forum in the Seventh Circuit.

Decisions of prisoner placement should be made by administrative expertise for reasons which can often not be articulated. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 11 (1979). However, the decision of the Court of Appeals effectively requires prison administrators to predicate certain classification decisions upon limited reasons which they must be able to articulate in a due process hearing. This holding therefore deprives the administrator of the discretion essential to the reasonable performance of his duties.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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(Appendices follow)

APPENDIX

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 79-2362 and 79-2488
DENNIS RAY ANTHONY,

Petitioner-Appellee,

v.

GEORGE C. WILKINSON, Warden, U.S. Penitentiary, Marion, Ill., HELENE BEIRNE, Alaska Commissioner of Health & Social Services, and the ATTORNEY GENERAL OF THE STATE OF ALASKA,

Respondents-Appellants.

Nos. 79-2361, 79-2363 and 79-2369
ROY J. GIROUARD, JOHN H. KILLARY and JOHN E. KASPER,

Petitioners-Appellees,

v.

GEORGE C. WILKINSON, Warden, et al.,

Respondents-Appellants,

CORNELIUS D. HOGAN,

Intervening Respondent.

Nos. 79-2364, 79-2365, 79-2366, 79-2367, 79-2368, 79-2370 and 79-2371
AUBREY MCKAY, CARL VINCENT HENRY, WILLIAM K. MEDERIOS, PETER M.K. LONO, DONALD A. MORGAN, GEORGE SHIMABUKU, and LEO MCGILL,

Petitioners-Appellees,

v.

GEORGE C. WILKINSON, Warden,

Respondent-Appellant.

Appeals from the United States District Court for the Eastern District of Illinois, Benton Division.
Nos. 79-C-2023, 79-C-2015, 79-C-2032, 78-C-2353, 78-C-2038, 79-C-2055, 79-C-2057, 78-C-2339, 78-C-2340, 78-C-2354 and 78-C-2373—James L. Foreman, *Judge.*

(Caption continued on following page)

Nos. 79-2362, 79-2488, 79-2361, 79-2363, 79-2369, 79-2364, 79-2365, 79-2366, 79-2367, 79-2368, 79-2370, 79-2371, 79-2374, 79-2410, 79-2411, 79-2412, 79-2485, 79-2486, 79-2487, 79-2531, 79-2532, 79-2533 & 79-2567

No. 79-2374

HERBERT WILLIAM LAWRENCE,

Petitioner-Appellee,

v.

ROBERT I. ELSEA, Warden,

Respondent,

CORNELIUS D. HOGAN,

Intervening Respondent-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 78-C-526—**James E. Doyle**, *Judge.*

Nos. 79-2410, 79-2411, 79-2412, 79-2485, 79-2486, 79-2487, 79-2531, 79-2532 and 79-2533

ROY J. GIROUARD, JOHN H. KILLARY, JOHN E. KASPER, CARL VINCENT HENRY, AUBREY MCKAY, DONALD A. MORGAN, WILLIAM K. MEDERIOS, PETER M.K. LONO and GEORGE SHIMABUKU,

Petitioners-Appellees,

v.

GEORGE C. WILKINSON, Warden, et al.,

Respondents,

CORNELIUS D. HOGAN, STATE OF DELAWARE, STATE OF ALASKA, and STATE OF HAWAII,

Intervening Respondents-Appellants.

Appeals from the United States District Court for the Eastern District of Illinois, Benton Division.
Nos. 79-C-2015, 79-C-2032, 78-C-2353, 79-C-2055, 79-C-2038, 78-C-2340, 79-C-2057, 78-C-2339, and 78-C-2354—**James L. Foreman**, *Judge.*

(Caption continued on following page)

Nos. 79-2362, 79-2488, 79-2361, 79-2363, 79-2369, 79-2364, 79-2365, 79-2366, 79-2367, 79-2368, 79-2370, 79-2371, 79-2374, 79-2410, 79-2411, 79-2412, 79-2485, 79-2486, 79-2487, 79-2531, 79-2532, 79-2533 & 79-2567

No. 79-2567

HERBERT WILLIAM LAWRENCE,

Petitioner-Appellee,

v.

ROBERT I. ELSEA, Warden,

Respondent-Appellant,

CORNELIUS D. HOGAN,

Intervening Respondent.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 78-C-526—James E. Doyle, *Judge.*

ARGUED MAY 16, 1980—DECIDED DECEMBER 23, 1980

Before SWYGERT, PELL and CUDAHY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Pursuant to 28 U.S.C. § 2241, twelve petitioner-appellees filed petitions for writs of habeas corpus alleging that their transfers from state to federal prisons because of insufficient state maximum security facilities were invalid under 18 U.S.C. § 5003(a), as construed by *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978) (*en banc*) ("*Lono*").[1] They sought release from federal custody and return to prisons in their respective states of conviction. Upon recommendation of a magistrate, the District Court for the Southern District of Illinois granted the petitions of the eleven prisoners who, at the time of filing, were incarcerated at the U.S. Penitentiary in Marion, Illinois ("Marion

[1] This opinion has been circulated among all judges of this court in regular active service. A majority did not favor a rehearing *en banc* on the question of overruling or partially overruling a prior decision of this court, *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978), or on the question of conflict with opinions in other circuits. The opinion of Judge Bauer concurring in this opinion in the absence of *en banc* consideration and the opinion of Judge Wood concurring in the denial of such consideration follow Judge Pell's opinion concurring as a member of the panel.

Penitentiary"). The District Court for the Western District of Wisconsin granted the petition of the one petitioner who, at the time of filing, was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin ("Oxford FCI"). Federal and state government respondents and intervenors appealed.

In *Lono*, we held that section 5003 conditions the authority of federal officials to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system. On appeal, the government parties argue that the transfers of these prisoners because of the unavailability of state maximum security facilities qualify as transfers for specialized treatment and that the procedures heretofore employed in making the transfer decisions were sufficient to satisfy petitioners' due process rights. We generally agree with the government parties that there may be instances in which conditions at federal maximum security facilities may constitute specialized treatment; however, because we find that in these particular cases the United States Bureau of Prisons (the "Bureau") and the states gave inadequate consideration to satisfaction of the *Lono* criteria prior to transfer and because the transfer evaluation procedures did not comport with due process requirements, we affirm.

I.

Following their convictions and incarceration for various offenses in five different states—Vermont, Alaska, Hawaii, New Mexico and Delaware—the twelve petitioners were transferred from state to federal custody pursuant to contracts between their states of origin and the Bureau as purportedly authorized by 18 U.S.C. § 5003(a).[2] All of the petitioners allegedly require

[2] Section 5003(a) provides:

> The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of

(Footnote continued on following page)

for their own benefit and for the benefit of society maximum security incarceration, which for one reason or another is not available in their states of origin.[3]

In the case of the four petitioners transferred from the state of Vermont, state corrections department hearing officers conducted proceedings prior to the petitioners' transfer to determine if the criteria established by the state's transfer policy were satisfied.[4] The terms of this policy do not require a determination whether petitioners are in need of specialized treatment or if such treatment facilities are available in the federal prison system.[5] Two of the three petitioners transferred

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[2] *continued*

persons convicted of criminal offenses in the courts of such State or Territory: *Provided* that any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

[3] Vermont closed its only maximum security institution in 1975. The states of Hawaii, Alaska, Delaware and New Mexico contend they do not have high-security facilities, or such facilities in adequate quantity, to provide for the incarceration of these petitioners.

[4] This policy requires that one or more of the following "criteria for federal transfer" must be met:

1. All in-state treatment and rehabilitative programs available for that individual have been considered and determined unsuitable.
2. All in-state alternatives in the area of security have been considered and found unsuitable for providing the required degree of security or protective custody for a particular resident.
3. A resident voluntarily requests transfer.

VERMONT DEP'T OF CORRECTIONS POLICY 891 (1975) *reprinted in* Appendix to Brief for Intervenor-Appellant Hogan at 22.

[5] Specifically, the record reveals the following details concerning the crimes for which the petitioners from Vermont were convicted and the reasons that prompted state officials to seek their transfers:

Ray Girouard is serving a life sentence entered in 1976 after his conviction in Vermont for first-degree murder. He is allegedly a suicide and escape risk as well as a management problem. In February 1976, a hearing officer, pursuant to the Vermont out-of-state transfer policy, determined that

(Footnote continued on following page)

from Hawaii were afforded state-conducted pre-transfer hearings; again, however, these proceedings did not consider the need for specialized treatment.[6] The two

[5] *continued*
Girouard's transfer was appropriate because of the length of his sentence, his attempts to escape, and the unavailability of state programs and inadequate security. Girouard was sent to Marion Penitentiary in March 1976. Since then, prison officials have held Girouard in close custody because he has been found to be a management problem and because he was found in possession of a knife.

Petitioner John H. Killary is serving a life sentence as a result of his October 1974 Vermont conviction for first-degree murder. At his Vermont transfer hearing in 1975, from which Killary was voluntarily absent, it was determined that because of his long sentence and his need for protective custody due to his reputation as a prison informant, Killary should be transferred into federal custody. Since arriving at Marion Penitentiary in May 1975, Killary has received numerous incident reports, reflecting disruptive and threatening behavior.

Petitioner John E. Kasper is serving three concurrent life terms imposed by the Vermont courts because of his status as an habitual offender as well for his conviction for numerous escapes. At his transfer hearing, it was determined that, given Kasper's past attempts to escape, his failure to respond to institutional programs, and the length of his sentence, he should be transferred to federal custody. In June 1977, Kasper entered the federal system at the U.S. Penitentiary at Leavenworth, Kansas ("Leavenworth Penitentiary"). He was subsequently transferred to Marion Penitentiary in September 1978.

Petitioner William Lawrence is serving a term of eight and one-half to thirteen years entered by a Vermont court in September 1977 upon his conviction for attempted armed robbery. At his Vermont transfer hearing, it was determined that the state's facilities provided unsuitable rehabilitative programs and inadequate security. He has been confined at the Oxford FCI since early 1978.

[6] The record discloses the following relevant background information about the three Hawaiian petitioners:

George Shimabuku is serving two life sentences without possibility of parole after convictions in Hawaii for murder. He has been diagnosed by Hawaii officials as a sociopath having "one of the worst conduct records" in Hawaii state prison. *See* Hawaii Dep't of Social Services, Individual

(Footnote continued on following page)

petitioners from Alaska received pre-transfer meetings or hearings.[7] These also did not evaluate the petitioners'

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[5] *continued*

Evaluation Summary, Jan. 21, 1969, Gvt. Ex. 3 attached to Transcript of Proceedings before Magistrate, May 7, 1979, Record at No. 11. In April 1969, petitioner was transferred to the federal system without a hearing. He was placed first in Leavenworth Penitentiary and then transferred to Marion Penitentiary.

Petitioner Peter M.K. Lono, (reportedly a cousin of Kenneth Lono, who was the petitioner-appellee in our *en banc Lono* decision) is serving a term of from 12 to 99 years after his conviction in Hawaii for second-degree murder. Following a February 1977 meeting with state officials, Lono was transferred into the federal system. During this pre-transfer hearing, it was discovered that the reasons for his transfer to Marion Penitentiary were partially disciplinary in nature. Although affidavits executed by Hawaii correctional officials in January 1979 state that Lono was transferred because there were specialized treatment facilities available for him in federal prisons, we note this finding followed his transfer by almost two years. The affidavits do not state that a determination was made that Lono required specialized treatment.

Petitioner William K. Mederios is serving a 20-year sentence for a burglary conviction, a 10-year concurrent sentence for conviction of possession of a harmful drug, a 5-year sentence for escape, and a life sentence for first-degree murder. Following a meeting with state officials in January 1975, Mederios was transferred to the federal system, first to the U.S. Penitentiary at McNeil Island, Washington ("McNeil Penitentiary"), and then to Marion Penitentiary. Although Mederios stated in the hearing before Magistrate Meyers that he was advised in his pre-transfer meeting that he was being transferred because the federal prison system had treatment facilities unavailable in Hawaii, we agree with Magistrate Meyers' conclusion that no showing was made at the meeting that Mederios required such treatment.

[7] The following background information on the Alaska petitioners is relevant:

Petitioner Donald Morgan is serving a life sentence and additional consecutive sentences totaling eight years after his convictions in Alaska for first-degree murder (committed while on escape status) for two counts of escape, and for grand larceny. Morgan allegedly was a severe management problem, and following a personal review hearing in November 1976,

(Footnote continued on following page)

need for specialized treatment nor the availability of such treatment facilities in the federal system. Neither one of the two petitioners from Delaware[8] nor the

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[7] *continued*
state officials decided to transfer him to federal custody. The reasons given for the transfer were the seriousness of the crime for which he was convicted, his escape risk status, and his continued poor institutional adjustment. Morgan was sent to McNeil Penitentiary in November 1976, to Leavenworth Penitentiary in February 1977, and to Marion Penitentiary in August 1977.

Petitioner Dennis Ray Anthony is serving a life sentence as well as consecutive sentences totaling twenty-three years imposed after his convictions in Alaska for first-degree murder, escape, and rape committed while on escape. Anthony also was afforded a personal review hearing in June 1975, after which state officials recommended his transfer to federal custody because of the length of his sentence, the seriousness of the crime for which he was convicted, and his escape risk status. He was sent to Leavenworth penitentiary in July, 1975 and subsequently transferred to Marion Penitentiary.

[8] The record yields the following information on the Delaware petitioners:

Petitioner Aubrey McKay is serving a 30-year sentence for a manslaughter conviction and a sentence equivalent to 595 years for convictions for rape, kidnapping, robbery, burglary, and other offenses committed while on furlough from his sentence for the manslaughter conviction. McKay was formerly incarcerated at Smyrna Prison in Delaware, which was under court order to limit the number of inmates. *See Anderson v. Redman*, 429 F. Supp. 1105 (D. Del. 1977). According to state officials who did not conduct a pre-transfer hearing, this circumstance, coupled with what they allege was the fact that McKay was in danger from his fellow inmates, who believed McKay's activities caused curtailment of the furlough policy, brought about McKay's inclusion in a group of 40 inmates transferred to federal custody in August 1978. McKay was sent to several federal institutions, including most recently Marion Penitentiary.

Petitioner Carl Henry is serving a sentence totaling 69 years for various offenses including attempted murder, assault with intent to murder, assault on a guard, and attempted escape. Like McKay, he was among the group of 40 inmates Delaware officials transferred to federal custody pursuant to court order. Prior to going to Marion Penitentiary, he did not receive a pre-transfer hearing.

petitioner from New Mexico[9] received pre-transfer hearings regarding their move from state to federal custody.

The eleven petitioners who were incarcerated at Marion Penitentiary at the time they filed their petitions in the District Court for the Southern District of Illinois received individual hearings before the United States Magistrate.[10] The magistrate consolidated the cases for purposes of his Report and Recommendation. Since the magistrate found that the requirement of *Lono*, that a showing of need for specialized treatment must be made prior to transfer of prisoners from state to federal custody, had not been satisfied, he recommended that their petitions be granted. *See McKay v. Wilkinson*, No. CV 79-2038 (S.D. Ill., Magistrate Meyers, Sept. 28, 1979). The District Court for the Southern District of Illinois (Foreman, J.) adopted the magistrate's recommendation and required that the Marion petitioners be returned to their respective state correctional systems within thirty days. *See McKay v. Wilkinson*, No. CV 79-2038 (S.D. Ill. Nov. 2, 1979). Both the magistrate and the district court expressed their disapproval of the *Lono* decision, which, they conceded, controls the instant petitions and requires that they be granted. The district court stayed its order pending appeal.

At the time of filing his petition, petitioner Lawrence was confined at Oxford FCI. He brought his petition in the District Court for the Western District of Wisconsin, where, on the authority of *Lono*, Judge Doyle granted it

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[9] The only New Mexico petitioner, Leo McGill, is serving a sentence of 75 to 275 years as a result of his conviction for armed robbery. Petitioner testified that he received no pre-transfer hearing and was told that he was being transferred to federal custody because he was a security risk. In March 1973, McGill was sent directly from New Mexico to Marion Penitentiary.

[10] Prior to this hearing, the magistrate granted motions to intervene filed by the following parties: Vermont's Commissioner of Corrections Cornelius Hogan; the state of Hawaii; the state of Alaska; and the state of Delaware.

without an evidentiary hearing.[11] The court's order required that petitioner Lawrence be returned to Vermont correctional facilities within thirty days. *See Lawrence v. Elsea*, 478 F. Supp. 480 (W.D. Wis. 1979). The district court denied the state intervenor's motion to stay the order, but on appeal, we granted the motion to stay.

II.

Our decision in *Lono* forms the primary basis for petitioners' claim for relief. Essentially, petitioners argue that since they did not receive a pre-transfer hearing on their need for specialized treatment and on the possibility of satisfaction of that need in the federal system, their transfers were illegal. In opposition, the federal and state respondents and intervenors take several alternative positions regarding the force of the *Lono* decision. They argue first that this panel should overrule the court's *en banc* decision in *Lono* rendered only a little more than two years ago, and second, that the instant cases are distinguishable from *Lono*.

In *Lono*, the petitioner, convicted of murder and armed robbery, was incarcerated in Hawaiian state facilities. In 1967, he was transferred to the U.S. Penitentiary, Leavenworth, Kansas, pursuant to a federal-state contract purportedly authorized by 18 U.S.C. § 5003. Two years later, he was transferred to Marion Penitentiary. Pursuant to 28 U.S.C. § 2241, Lono filed a petition for habeas corpus in the District Court for the Eastern District of Illinois. The parties stipulated that Lono had never received any hearing on, or a statement of reasons for, his transfer from the state to the federal prison system. Lono contended that because of his transfer to federal prisons in the continental United States he had been unable to see any of his friends or family for over ten years and that he had been unable to communicate with counsel familiar with Hawaiian law so that he could petition for resentencing

[11] Judge Doyle also granted Vermont's Commissioner of Corrections Hogan leave to intervene in the case.

under the 1972 amendments to Hawaii's Penal Code. Moreover, he was unable to formulate such a petition on his own because the necessary Hawaiian legal materials were unavailable at Marion Penitentiary.

In setting aside the decision of a three-judge panel of this court, we *en banc* held that 18 U.S.C. § 5003 requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system. To reach this result, we relied upon terminology unique to § 5003, which authorizes the Attorney General to contract for such transfers "when the Director [of the Federal Bureau of Prisons] shall certify that proper and adequate *treatment* facilities and personnel are available. . . ." 581 F.2d at 647 (emphasis supplied). We also relied upon the section's legislative history which we said "makes it clear that the statute is not ambiguous and that the word 'treatment' is advisedly used." *Id.*

Since we issued our decision in *Lono*, two Courts of Appeals as well as several district courts have rejected its conclusion.[12] However, no matter how many other courts may have reached a conclusion contrary to our own, absent Supreme Court pronouncement to the contrary or legislative revision,[13] a panel of this court is

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[12] *See, e.g., Howe v. Civiletti*, No. 79-2251 (2d Cir. June 23, 1980); *Sisbarro v. Warden*, 592 F.2d 1 (1st Cir.), *cert. denied*, 444 U.S. 849 (1979); *Bowers v. Fenton*, 488 F. Supp. 570 (M.D. Pa. 1979); *Spence v. Fenton*, Civ. No. 79-277 (M.D. Pa. Sept. 18, 1979) *Gomes v. Moran*, 468 F. Supp. 542 (D.R.I. 1979); *Fletcher v. Warden*, 467 F. Supp. 777 (D. Kan. 1979); *Shakur v. Bell*, 447 F. Supp. 958 (S.D.N.Y. 1978).

[13] In an order of November 29, 1979, directed to the Government, we stated in pertinent part as follows:

> The *en banc* decision of this court in *Lono* was filed on July 25, 1978. No Petition for Certiorari was sought by the United States. Now well over a year later this court is faced with *Lono* questions being raised by numerous state prisoners in federal custody in this circuit. We assume that the Department of Justice has not chosen to ignore *Lono* in this circuit. It was suggested by the majority opinion in *Lono* that legislation was needed to conform

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[13] *continued*

Bureau of Prisons' practice to the law. Government counsel is requested to advise this circuit what, if anything, is being done by the Department of Justice in this regard. *Girouard v. Wilkinson*, No. 79-2361 (7th Cir. Nov. 29, 1979) (order setting and consolidating briefing, appointing counsel, and requesting information) at 2-3.

Rather belatedly, the Government responded to our order in its reply brief, informing us that the Justice Department had submitted amendatory language for § 5003 to the staff of the Senate Judiciary Committee, which is considering a comprehensive revision of the United States Criminal Code. The Senate bill proposes that § 5003(a) be replaced with the following provision from which any reference to "treatment" facilities is noticeably absent:

> The Director may contract with the proper authorities of a State, territory, or locality, or, at the request of the tribal leaders, with an Indian tribe, for the official detention, including safekeeping care, subsistence, correctional programs and employment, in a federal penal or correctional facility, of a person convicted of an offense in a court of such State or territory or Indian tribe, if the Director finds that proper and adequate penal or correctional facilities and personnel are available. . . .

S. 1722, 96th Cong., 1st Sess. § 573(b) (1980).

S. 1722 was reported favorably by the Committee on January 17, 1980, and passage by the Senate is currently expected within a short time. The Committee report which accompanies the bill makes no explanation for the omission of the reference in § 5003 to "treatment." *See* S. Rep. No. 553, 96th Cong., 2d Sess. 1222-23 (1980).

On July 2, 1980, the House Judiciary Committee reported to the full House of Representatives its recommended revisions of the Criminal Code. Included in that bill is the following provision which retains § 5003's reference to "treatment":

> The Attorney General, when the Director certifies that proper and adequate treatment facilities and personnel are available, is authorized to contract with the proper officials of a state for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or territory, but any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

H.R. 6915, 96th Cong., 2d Sess. § 3918(a) (1980).

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bound by a prior (and recent) decision of the court reached *en banc*. *Ewing v. Williams*, 596 F.2d 391, 397 (9th Cir. 1979); *United States v. Poolaw*, 588 F.2d 103, 105 (5th Cir.), *cert. denied*, 440 U.S. 966 (1979); *Brown v. United States*, 508 F.2d 618, 625 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975). *See also United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972). *En banc* consideration is required to overrule such a decision. *See generally* Fed. R. App. P. 35. Hence, for purposes of decision by this panel, *Lono* states the applicable law, and we must reject respondents' argument that it should be overruled. Appropriate principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in *Lono*.[14]

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[13] *continued*

The report which accompanies the bill acknowledges that our opinion in *Lono* differs from the positions taken on the issue by the Courts of Appeals for the First and Second Circuits, *see* note 12 *supra*, but states that the Committee does not wish to take a position in the controversy. *See* H. Rep. No. 96-1396, 96th Cong., 2d Sess. at 480 (September 25, 1980).

Obviously, if the bills for revision are passed by the respective Houses of Congress, they will presumably go to the conference committee and, thence (after further action by the House and Senate and absent unforeseen obstacles) to the President. As a result legislative action having a major impact on the *Lono* doctrine may take place in the near future.

Contrary to the cautious hopes for legislative action held out in this footnote, at the date of issuance of this opinion, the Ninety-Sixth Congress had adjourned sine die, without passing this legislation for revision of the Criminal Code.)

[14] Although for good reason we decline here to reexamine the merits of *Lono*, we note that in its reply brief, Delaware presents an argument, not presented in *Lono*, which it claims requires overruling that decision. This argument is based upon 18 U.S.C. § 5003(c), which Delaware claims may not be read consistently with § 5003(a) as construed in *Lono*. Section 5003(c) provides:

> Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

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III.

In any event, the federal and state respondents and intervenors contend that *Lono* is distinguishable from the case presented by the instant petitioners. In *Lono*, the

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[14] *continued*

Delaware's argument may be summarized, as follows: In the discretion of federal prison officials, federal prisoners may be denied access to treatment programs. Pursuant to § 5003(c), once they are in the federal system, state transferees are to be treated as if they were federal prisoners. Accordingly, state transferees also may be denied access to such programs. Thus, our decision in *Lono* leads to an anomalous result—that state prisoners, who may not be transferred into the federal prison system absent a demonstration that they require specialized treatment available only there, after being received into the federal system, may be denied such treatment.

This argument falls of its own weight. First, Delaware implicitly concedes that § 5003(a) and § 5003(c), by their terms, do not address the same problem. The former specifically sets the criteria for the transfer of state prisoners into the federal system, while the latter generally sets forth the manner in which transferees are to be treated. "It is a cardinal principle of statutory construction that the more specific controls over the more general." *Central Commercial Co. v. Commissioner*, 337 F.2d 387, 389 (7th Cir. 1964) *quoted in First Bank of Oak Park v. Avenue Bank*, 605 F.2d 372, 375 (7th Cir. 1979). Moreover, the two subsections are not necessarily inconsistent. Section 5003(c) may be construed as authorizing federal prison officials to subject transferees to the same disciplinary rules as federal prisoners. Such a construction is supported by the legislative history of § 5003(c), which states that ". . . all prisoners, when possible, should be treated alike in order that there be no favored inmates or groups of inmates." H.R. Rep. 1633, 82d Cong., 2d Sess., *reprinted in* (1952) U.S. CODE CONG. & AD. NEWS 1420, 1421. Similarly, § 5003(c) also may be construed as authorizing the retransfer among the various federal prisons of transferees once that they are lawfully received into a federal prison, just as federal prisoners are subject to intra-system transfers. Such transfers would not necessarily violate *Lono*, although we believe that it is implicit in our holdings in *Lono* and in the instant case that intra-system transfers of transferees from state prisons may not be made to facilities which lack the treatment programs which permitted their initial reception into the federal prison system. What procedural requirements, if any, attend such transfers is a question we need not, and do not, decide.

parties agreed that the petitioner had never received any hearing on, or a statement of reasons for, his transfer from the state to the federal prison system. The governmental respondents and intervenors argue that the record in the instant case, unlike that in *Lono*, clearly discloses the reasons for petitioners' transfers into federal custody. They state that the record reflects that each petitioner had been convicted of a serious crime or crimes and that each requires a high level of prison security, which for one reason or another is unavailable in the state systems. In response, petitioners argue that it is precisely because the record reveals that the transfers were for security and related reasons, that they are invalid. Such purposes of transfer, petitioners argue, do not qualify as "specialized treatment." Respondents and intervenors disagree, averring that federal maximum security institutions are "specialized treatment" facilities within the meaning of *Lono*, that petitioners' placement therein was for "specialized treatment," and that the procedures which accompanied petitioners' transfers were sufficient to guarantee their due process rights. Although we cannot accept the government's contentions regarding the sufficiency of the process afforded these petitioners, we generally agree that the fact that the transfers in the instant cases were for security and related reasons may qualify these transfers as responsive to a need for "specialized treatment" as required by *Lono*, construing 18 U.S.C. § 5003(a).

In the instant case, the magistrate found with respect to the nature of the conditions under which most of the instant petitioners were incarcerated in their respective state systems that:

> The Respondents maintain that in situations where a state prisoner becomes unmanageable the state institutions are not able to properly care for them. Such situations arise when the state inmate is extremely hostile (i.e. assaults or murders other inmates) or prone to escape. Since the state correctional systems involved in the case at hand (Delaware, Hawaii, Alaska, Vermont, and New Mexico—each relatively small in total population, incarcerating an equally relative small number of

> the type of inmates in issue) do not have the facilities to properly prevent such activity, they are constrained to either shackle the inmate or confine the inmate to his cell 24 hours a day, save an occasional 30 minute exercise period. *McKay v. Wilkinson*, No. CV 79-2038 (S.D. Ill., Magistrate Meyers, Sept. 28, 1979) at 10-11.

For petitioner Lawrence, whose case was before the District Court for the Western District of Wisconsin, the court made relevant findings about the lack of any long-term, maximum security prison in Vermont.[15]

In testimony before the magistrate, the executive assistant to the warden at Marion Penitentiary stated that, although Marion is the most secure of all federal facilities, it is still able to allow freedom of movement for the inmates and to provide a wide variety of programs for these inmates. Included in the activities he described are work programs; educational programs, ranging from adult basic education to college courses;[16] indoor and outdoor recreational programs; informal and formal counselling through the prison's mental health department; religious programs; and the activities of various inmate organizations such as the Jaycees and Alcoholics Anonymous.[17]

Petitioners contend that "ordinary custodial privileges such as free time, run-of-the-mill work programs, and other usual services" do not qualify as "treatment." In light of the legislative history analyzed in *Lono*, we con-

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[15] "Because there was no such facility, treatment and programs available to minimum and medium security prisoners in Vermont were not available to petitioners." *Lawrence v. Elsea*, 478 F. Supp. at 483.

[16] Petitioner Anthony has earned a Bachelor of Arts degree from Southern Illinois University while in federal custody.

[17] Unfortunately, the record does not disclose the conditions under which inmates at FCI Oxford are incarcerated. Unless FCI Oxford is a maximum security facility, a fact we question (*see* U.S. DEP'T OF JUSTICE, FACILITIES '78 at 19 (1978); *see also Brown v. Carlson*, 431 F. Supp. 755, 760-61 (W.D. Wis. 1977)), we are perplexed why the state of Vermont could not accommodate petitioner Lawrence within its own system.

clude that "treatment" must be construed as therapeutic or rehabilitative in nature. That is, it must consist of something more than, and different from, mere incarceration, and must encompass procedures and conditions which primarily benefit the prisoner individually and not simply society as a whole.[18] However, the precise nature of such procedures and conditions may vary from prisoner to prisoner and from time to time.[19] Consequently, while we agree that mere custody does not constitute "treatment," we find petitioners' argument overly narrow because it ignores the austere conditions facing these petitioners in their respective state institutions and the wider range of opportunities available to them in the federal system.

The increased availability of programs in the federal system is an improvement upon the conditions under which petitioners would remain incarcerated in the state systems. While the availability of programs alone is no guaranty that the prisoner will participate, we find that this amelioration of conditions is likely to benefit the prisoner. Accordingly we perceive a therapeutic benefit which *for these purposes* may be construed as "treatment." Thus, if a sufficient array of programs is provided in connection with incarceration in a maximum security prison, it may be possible to conclude in individual cases under *Lono* that a need for specialized treatment has been demonstrated.

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[18] We recognize, of course, that by protecting society as a whole, the prison system may incidentally be doing something in the prisoner's best interest, albeit without his knowledge. However, we believe that the "specialized treatment" required by *Lono* must consist of something which directly enhances the well-being of the individual prisoner.

[19] Historically, the "treatment" of criminals has varied greatly. For example, hard labor, originally thought of as punitive, subsequently was seen as rehabilitative. *See United States v. Moreland*, 258 U.S. 433, 449-50 (1922) (Brandeis, J., dissenting). "Treatment" also has been thought to include psychosurgery, behavior modification, and general education. *See generally* Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 Clev. St. L. Rev. 147 (1978).

Petitioners also argue that a definition of "treatment" found in the Youth Corrections Act demonstrates that the conditions under which they are incarcerated do not qualify as "treatment." Specifically, petitioners quote 18 U.S.C. § 5006(f) which states that "'treatment' means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders." As discussed in *Lono*, 581 F.2d at 647, the legislative history supports petitioners' general proposition that the definition of "treatment" found in § 5006(f) should inform our construction of that word as it is used in § 5003(a). However, this definition neither mandates a narrow definition of "treatment" nor precludes the result we reach.

The Supreme Court has stated that the range of permissible "treatment" under the Youth Corrections Act is broad. *See Dorszynski v. United States*, 418 U.S. 424, 434 (1972). Thus, under the Act "treatment" has been construed to range from probation to maximum security incarceration. *Compare United States v. Glasgow*, 389 F. Supp. 217, 221 (D.D.C. 1975), *with Brown v. Carlson*, 431 F.Supp. at 773 (dicta). In addition, we think that the reference to "correcting . . . antisocial tendencies" in § 5006(f) demonstrates that "treatment" is to be given a broader definition than just medical treatment, the limitation which petitioners would have us adopt. The legislative history of the Youth Corrections Act reveals that it was modeled, in part, on the English Borstal system. That early 20th Century system provided vocational, educational and recreational programs, now considered "run-of-the-mill," in a broad range of institutions, some walled, some completely open. H.R. Rep. 2979, 81st Cong., 2d Sess., *reprinted in* (1950) U.S. CODE CONG. & AD. NEWS 3983, 3987. Also, prisoners are constitutionally entitled to receive medical treatment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Thus, under the Act "treatment" must comprise more than simply medical treatment.

Another section of the Youth Corrections Act also supports our conclusion that "treatment" may be construed to include maximum security incarceration accompanied

by participation in "run-of-the-mill" programs. 18 U.S.C. § 5011, which is captioned "Treatment," provides that "[c]ommitted youth offenders . . . shall undergo treatment in institutions of maximum security, medium security, or minimum security types . . . ." Based on these provisions, at least, Congress did not intend that maximum security incarceration and "treatment" were to be deemed mutually exclusive. Section 5011, read in conjunction with § 5006(f), indicates that "treatment" may be construed to comprehend that kind of maximum security incarceration which provides an improvement in conditions and offers the greatest administratively feasible freedom of movement and access to programs.

To summarize, we think that even something so far removed from traditional notions of "treatment" as high security incarceration, with the opportunity to participate in attendant religious, educational, recreational and other programs, in particular cases may satisfy § 5003. We can perceive these conditions as meeting "some special treatment need with which the state required assistance." *Lono v. Fenton*, 481 F.2d at 648. Nothing in *Lono* precludes such a relatively broad construction of "specialized treatment."

However, we stress that, while a broad construction of "treatment" may be appropriate for the instant statutory purpose, in other contexts such a broad construction might be wholly inapt. Thus "treatment" and "punishment" must, for some purposes, be clearly distinguished, and distinctions among "therapeutic," "deterrent," "[redacted] "punitive" or "retributive" ends need to be maintained in the face of semantic confusion. Our view of "treatment" here arises from the unusual provisions and purposes of the particular statute under consideration. Under these circumstances, we think that our relatively broad view of "treatment" is justified.

IV.

Our observations as to what may qualify as "specialized treatment" under *Lono* obviously cannot in and of themselves legitimize the continued federal incarceration of the instant petitioners. In *Lono*, the government

agreed that if 18 U.S.C. § 5003 were construed to require a showing of Lono's need for specialized treatment as a condition precedent to transfer, then Lono would be entitled to a pre-transfer hearing. As earlier noted, the federal government has altered its position, arguing that a "record review," which it contends federal prison officials performed in the instant cases, was sufficient to protect petitioners' due process rights.[20] Several of the state intervenors contend that the pre-transfer proceedings which they conducted for some of the petitioners were adequate to satisfy the requirements of our decision in *Lono*. Petitioners argue that they were entitled to a pre-transfer hearing; however, they have failed to describe the hearing process in any detail and to indicate what should be the interaction between state and federal officials in deciding whether a transfer from state to federal custody is being made for a proper statutory purpose. Judge Doyle, in granting the petition before him, interpreted *Lono* as requiring that the Bureau of Prisons conduct a pre-transfer hearing. Judge Foreman did not reach this issue.

In *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montanye v. Haymes*, 427 U.S. 236 (1976), the Supreme Court considered the conditions that must be present for a prisoner to be entitled to a hearing before his transfer from one state prison to another prison within the same state. The Court "held in *Meachum v. Fano*, that no Due Process liberty interest of a duly convicted prison inmate is infringed when he is transferred . . ., whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye v. Haymes*, 427 U.S. 236, 243 (1976). In the absence of a law or practice which conditions the transfer on the happening of specified events, a prisoner was found to have no "liberty interest" deserving of due process protection in remaining in a given institution:

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[20] In oral argument, however, government counsel seemed to broaden her position to include a hearing within the definition of what minimum due process requires.

> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all. *Meachum v. Fano*, 427 U.S. at 228.

In the instant case, on the other hand, following *Lono* we conclude that prior to transfer of a prisoner from state to federal custody there must be a finding of a need for specialized treatment. This holding negates the existence of discretion, which the Supreme Court in *Meachum* and *Montanye* found to preclude the implication of a liberty interest deserving of due process protection. Hence, the guarantees of due process attach to petitioners' liberty interest in being safeguarded, in the absence of the determinations required by *Lono*, against transfer to federal prisons. Our task, therefore, is to determine whether the procedures provided to these petitioners to protect their liberty interest were adequate and, if not, what due process requires in establishing that the transfer of a prisoner from state to federal prison is made for a proper statutory purpose.

We are guided in our analysis of what due process requires in this situation by the balancing test the Court enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As to the first factor, the interest a state prisoner has in not being transferred to the federal system without the proper *Lono* findings is very substantial. The transfer

may interrupt his contacts with friends and family. Equally important, it may effectively prevent his communication with legal counsel familiar with the laws of the state in which the prisoner was convicted.[21] Once in the federal system, a prisoner may be transferred unexpectedly to other federal prisons even farther removed from family and counsel. In this respect, the statute governing transfers within the federal prison system, 18 U.S.C. § 4082(b), does not create a liberty interest in federal prisoners deserving of due process protection but rather gives federal prison officials full discretion to transfer inmates. *Walker v. Hughes*, 558 F.2d 1247, 1253 (6th Cir. 1977); *McDonnell v. United States Attorney General*, 420 F. Supp. 217, 221 (E.D. Ill. 1976). Similarly, reclassification of federal prisoners for purposes of treatment is fully discretionary with prison officials. The relevant statutory section, 18 U.S.C. § 4081, does not grant prisoners a protectable liberty interest. *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976).[22] Thus, while the transfer to federal facilities presumably provides a state

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[21] *See Gomes v. Travisono*, 490 F.2d 1209, 1217 (1st Cir.), (Campbell, J., concurring), *vacated* 418 U.S. 909, *aff'd. as modified* 510 F.2d 537 (1974) ("[T]o be cast outside the jurisdiction within which one was sentenced is often to be separated from rights, privileges, and standards otherwise available—to become to some degree, a 'man without a country'."); *Tai v. Thompson*, 387 F. Supp. 912, 915 (D. Hawaii) ("Just as a prisoner who is put in isolation for disciplinary reasons is prevented from having meaningful contact with friends or family, a transferee may suffer the same harm."); *Hoitt v. Vitek*, 361 F. Supp. 1238, 1248-50 (D.N.H. 1973), *aff'd sub nom. Laaman v. Vitek*, 502 F.2d 1158 (1st Cir. 1974) (Describing nine adverse effects which transfer may have, including a detrimental impact on the rehabilitation of the prisoner); *Capitan v. Cupp*, 356 F. Supp. 302, 303 (D. Ore. 1972) ("I am satisfied that the transfer of a prisoner from a state institution to a federal prison 2,000 miles away from his family and his home is a 'grievous loss' which requires the imposition of some procedural safeguards.").

[22] Intervenors from the states of Hawaii, Delaware, and Vermont cleverly argue that the same discretion which federal officials are granted in handling prisoners already in the federal system should apply to the decision to transfer prisoners from state to federal custody. This argument ig-

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prisoner with access to beneficial treatment, it at the same time significantly reduces, if it does not eliminate, his opportunity to maintain important contacts which may have an equally significant effect on his adjustment to prison life and on his prospects for rehabilitation.

Because of the possibility of such grievous losses, a prisoner subject to transfer under 18 U.S.C. § 5003 is more like the alleged parole violator in *Morrissey v. Brewer*, 408 U.S. 471 (1972), or the state prisoner scheduled for involuntary transfer to a state mental institution in *Vitek v. Jones*, ... U.S. ....., 100 S. Ct. 1254 (1980) (requiring more elaborate process) than like the prisoners in *Wolff v. McDonnell*, 418 U.S. 539 (1974) (requiring less extensive process). These comparisons are based on the fact that the prisoners in *McDonnell* faced only a remote and contingent extension of incarceration due to lost good time credits and were thus afforded fewer procedural protections while the parolee in *Morrissey* or the prisoner in *Vitek* were confronted with immediate and tangible loss and were provided correspondingly demanding and extensive procedural protections.[23] Similarly, the loss facing the

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[22] *continued*
nores the differences in language between 18 U.S.C. § 5003 and the statutory sections governing operation of the federal prison system. The liberty interest that a state prisoner has in not being transferred to federal custody without a determination of a need for specialized treatment and of probable satisfaction of that need in the federal system is created by language which is missing in the analogous sections governing transfer and treatment of federal prisoners.

[23] As the Court observed in *McDonnell*,

> For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that.

418 U.S. at 560-61.

state prisoner who is about to be transferred to the federal system is qualitatively more severe than that facing the prisoners in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11 (1979), who, because their interest in parole release determinations involved only a conditional or contingent liberty, were entitled to fewer procedural protections than the parolee in *Morrissey*.

The minimum due process requirements found necessary in the parole revocation situation in *Morrissey* included;

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. at 489.

Eight years later, the Supreme Court ordered almost identical procedures for the prisoner in *Vitek*, who faced the deprivation of liberty involved in a transfer to a mental institution.[24] By comparison, the prisoner facing

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[24] The minimum due process requirements found to be necessary in *Vitek* included:

> "A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> "B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> "C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-

(Footnote continued on following page)

the loss of good time credits in *McDonnell* was found to be entitled only to notice of the charges, a statement of the evidence relied upon and of the reasons for the action, and the opportunity (if permitting him to do so would not jeopardize security or correctional goals) to call witnesses and present documentary evidence. 418 U.S. at 563-71. The prisoners in *Greenholtz*, who were also facing a loss of more contingent liberty interests, were found undeserving of the full panoply of *Morrissey* procedures. 442 U.S. at 16.

In our earlier description of the pre-transfer procedures which were used by the states here involved, we noted that while two of the states conducted no proceedings and the other three states employed a wide range of deliberative mechanisms, federal review of each transfer decision was uniform. According to federal counsel, the Director of the Bureau of Prisons or his representative reviewed each transferee's file and on that basis made a finding that the individual state prisoner was in need of maximum security unavailable in the state but readily available in the federal system. The language of § 5003, which states that the Attorney General may contract with the states after certification from the Director of the Bureau that treatment facilities are available, makes clear that the ultimate finding of the need for treatment and of its potential satisfaction in the federal system must come from the Director. In the instant case the federal system accepted these prisoners

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[21] *continued*

examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

"D. An independent decisionmaker;

"E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

. . .

"G. Effective and timely notice of all the foregoing rights.

100 S. Ct. at 1264, *quoting Miller v. Vitek*, 437 F. Supp. 569, 575 (D. Neb. 1977).

without any federal participation in, or direct corroboration of the determination of the need for specialized treatment and of how it could be met in the federal system. Clearly, the risk of an erroneous deprivation of an inmate's private liberty interests is relatively high in a case where the only safeguard used to insure compliance with statutory requirements is the opinion of one federal official formed by his reading a record without the opportunity for anyone—the prisoner or his representative—to question that opinion. As a result, we find that the decision to accept these petitioners into the federal prison system was made in derogation of their due process rights.

We think that only by utilizing (at a minimum) the procedures ordered in *Morrissey* will the transferee's interest be adequately protected. *Morrissey*, 408 U.S. at 489. As noted, the nature of the private interest here is similar to the immediate and tangible deprivations of liberty involved in *Morrissey* and *Vitek*. The procedures designed in these cases to elicit specific facts are appropriate in the situation in which the prisoner's criminal record, his record of incarceration, his rehabilitative needs, and suitable federal facilities must be evaluated. Also, given the fact that under § 5003(a) transfers are permitted only for the purpose of providing specialized treatment, some procedure for subsequent re-evaluation should be provided.

A hearing before federal officials is essential if the inmate is to have any opportunity to question the transfer decision and if the decision is to reflect the individual treatment needs of each prisoner. The opportunity to question would be pointless without advance notice of the basis for transfer, disclosure of the evidence upon which the officials intend to rely and an opportunity for the prisoner to present documentary and testimonial evidence. The inquiry does not present the dangers of potential disruption upon which the Supreme Court relied in *McDonnell* to pare the right to confrontation and cross-examination from the list of procedures to which inmates were entitled in disciplinary proceedings. 418 U.S. at 567-69.

We anticipate that at the time of a transfer hearing, the inmate's behavior in prison will already be an established matter of record. The *Morrissey* procedures adequately recognize the government interest in avoiding disruption by limiting, in appropriate circumstances, the inmate's right to call witnesses and to confront and cross-examine witnesses. Despite petitioners' general allegations that financial considerations guide the Bureau's decision to accept transferees, we do not interpret the *Morrissey* requirement of an impartial hearing body to bar Bureau officials, or in some instances state officials, from conducting the hearing. Rather, we believe that impartiality merely demands that officials who have not been associated with past determinations relating to the inmate's disciplinary or social adjustment problems render the ultimate decision of compliance with *Lono*. While our requiring a summation of the evidence and the reasons for decision might entail some administrative inconvenience, such procedures help insure that the decision will not be arbitrary. Finally, although we are reluctant to order that an attorney be appointed to aid the inmate seeking to prevent his transfer, we believe that the prisoner should be allowed to rely upon a lay advocate or other assistant of his choice in formulating and presenting his case.

Several of the state intervenors argue that the pretransfer proceedings they provided their transferees were sufficient to satisfy the due process rights of the petitioners.[25] Given our determination that there must be

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[25] This argument is advanced by the states of Vermont, Hawaii, and Alaska. The Vermont hearings were conducted pursuant to the following procedures established by the state's transfer policy:

> 1. When a hearing is requested on a case involving possible out of state transfer, the resident will receive written notice of the hearing, and the reasons for the proposed transfer, at least 24 hours ahead of time scheduled for the hearing. The Superintendent at the holding facility will be responsible for the proper notification of the resident.

(Footnote continued on following page)

[25] *continued*

2. The inmate may waive the hearing, in writing, if he chooses.

. . . .

4. The resident will be allowed to be present at the hearing, testify on his own behalf, call witnesses or present documentary evidence, so long as this is not unduly hazardous to institutional safety or correctional goals. The resident may be represented by law counsel from the facility staff where this is feasible.

5. After the hearing is held, the Hearing Officer will notify the Director of Community Correctional Centers of the results . . . . The Director of Community Correctional Centers will forward these results, . . . to the Commissioner. Based on this report, . . . the Commissioner will make the final decision. The Commissioner will notify the Director of Community Correctional Centers, in writing of his decision. The Director of Community Correctional Centers will then notify the Superintendent of the sending facility. The Superintendent will then be responsible for the notification of the resident.

6. If a prior hearing cannot be afforded because the delay required would endanger the safety of the resident or the security of the facility, the Commissioner may order the transfer, and the hearing may be held up to 10 days after the resident is moved. This hearing shall be conducted before a hearing officer designated by the Commissioner. The reasons for the delay will be given to the resident in writing at the time of transfer. The transfer order will include a statement of the inmate's right to a hearing within this designated time limit. As with hearings held prior to transfer, the report will be forwarded to the Commissioner, who will confirm or reverse the transfer, and notify the inmate, in writing, of his decision, including a copy of the hearing results.

VERMONT DEP'T OF CORRECTIONS POLICY, *supra* note 4 at 24-25.

Except for its apparent failure to allow the inmate an opportunity to cross-examine and confront witnesses, this policy appears to satisfy the *Morrissey* requirements.

Apparently, the Hawaii practice, prior to transferring a prisoner to the federal system, is to conduct a hearing with the inmate present. Several days' advance notice is given, and following the hearing, the inmate receives a statement of reasons for the transfer. From the record, it is unclear whether the inmate may present evidence and cross-examine witnesses. A state court reviewing one of the petitioner's ob-

(Footnote continued on following page)

a federally conducted hearing, their argument must fail. Nonetheless, our conclusion should not be viewed as a blanket rejection of the use of state-conducted hearings in evaluating the *Lono* criteria. Our holding in *Lono* requires that, prior to an inmate's transfer from the state to the federal prison system, two analytically distinct determinations be made: First, there must be a finding that the particular inmate is in need of specialized treatment unavailable in the state of conviction; and second, that federal treatment facilities which may satisfy that need are available. As a practical matter, state corrections officials are in the best position to assess the first factor, and federal officials are most knowledgeable about the second. Presumably, if both matters were determined in one hearing conducted by the Bureau, state witnesses would provide the bulk of the testimony. For this reason, we perceive no objection to the states making the initial determination with respect to the need for treatment, provided that state officials are able to demonstrate to the satisfaction of the Bureau that they employed the same procedures which we find are necessary to ensure that the ultimate federal certifica-

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[25] *continued*
jections to his transfer was satisfied that the inmate was given an opportunity to testify and present evidence. In oral argument, counsel for Hawaii stated that the hearing is informal and that the recommendation which results is advisory only to the state correctional superintendent. Counsel for Delaware stated that Delaware's procedure is like Hawaii's. The details of the Alaska pre-hearing procedures are less than clear from the record. Some type of pre-transfer meeting was apparently held with the inmates. The affidavit of a state official states that one of the transferees received notice of the meeting and an opportunity to present evidence at the meeting; the prisoner himself testified the proceeding was one at which he was merely informed of his transfer. He also stated he received notification, but apparently not the reasons for his transfer. The other Alaska petitioner received a hearing, the precise nature of which is unclear, and a fairly substantial explanation of reasons for his transfer. In oral argument, counsel for Alaska stated that the proceeding is conducted in accordance with Alaska's administrative code, which he stated requires: a hearing; notice; and an opportunity to be heard, to present witnesses, and to confront adverse witnesses.

tion of compliance with *Lono* does not cause an erroneous deprivation of the prisoner's liberty interest. In such a situation, subject to the right of the prisoner to raise objections, the federal hearing officers would have the option of affirming the state finding regarding the need for treatment and then proceeding to focus the ensuing federal hearing on whether federal facilities might satisfy that need.

This bifurcated process (involving a state hearing followed by a federal hearing) would preserve a distinct state decisionmaking role. Another option might be a single joint hearing presided over by both a state and federal hearing officer, with federal officers to make all decisions required by § 5003 as construed by *Lono* (and state officers presumably making any decisions required by state law). A third alternative (perhaps the simplest and cheapest from a federal viewpoint) would be merely a hearing conducted by federal officials to determine all the *Lono* questions.

We do not reach our conclusions about the need for hearings in ignorance of the fiscal and administrative burdens they may create. The governmental parties have briefed these issues in detail. We are also mindful that the five states involved in the instant transfers are relatively small and have not found it desirable from the standpoint of cost-effectiveness to establish adequate maximum security facilities. No doubt to return the petitioners before us to state custody will entail significant expense. In the future, however, the financial burden of conducting hearings will presumably be borne by the Bureau of Prisons since by statute its Director is the individual charged with certifying compliance with *Lono*. While less than a perfect solution, we believe that of the three interests before us—individual, state, and federal—the latter should most appropriately bear the burden of compliance with § 5003.

In any event any burdens imposed by *Lono* or by our decision today are well worth bearing in light of the serious allegations of "warehousing" of prisoners on a purely economic basis, which have been raised. Indeed the economics of some overcrowded and some relatively

empty prisons (to the extent these can be found) must certainly exert pressures for transfers between state and federal facilities unjustified by penological considerations. But, if state and federal planning for prisons is anywhere near the mark, the number of prisoners requiring transfer should always be modest. Therefore, the economic costs of due process should not be unbearable. Measured against the human costs of unjustifiable transfers, these economic costs must weigh lighter on the scales. The investment in due process is not only mandated by the Constitution but promises to yield a generous return in the precious coin of human dignity.

AFFIRMED.

PELL, *Circuit Judge*, concurring.

If I were free to do so, I would dispose of this case on the basis of the dissenting opinion in *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978). I am not, however, free to do so because that case is an *en banc* decision of this court, and I have no reason to believe that the majority of active judges of this court would deviate from the position taken in that case, notwithstanding that the First and Second Circuits have reached the opposite result. I do think that Judge Cudahy's opinion in the present cases represents a reasonable application of the established position of this circuit on the issue, particularly in view of facts developed in the present cases which were not brought out in *Lono*. I, therefore, concur in Judge Cudahy's opinion.

In view of the very real problem experienced by some smaller states, as demonstrated by these cases, of coping with high-risk prisoners, in the interest of public safety it appears imperative to me that an early solution of the problem presented by transfers from state to federal institutions should be reached.

That solution could be reached under the existing statute by the grant of certiorari by the Supreme Court, in view of the fact that there is a split between circuits.

For some reason, the Department of Justice did not choose to pursue certiorari on the *Lono* case. Irrespective of whether the Department does so in this case, there are intervening parties in the present litigation who have a vital interest in the subject and who may want to follow through in an attempt to secure a definitive opinion.

The other source of a solution, of course, is the Congress. That body, according to Judge Cudahy's opinion, has the matter of revision before it. I note, however, that this consideration is a part of a much larger subject, a comprehensive revision of the United States Criminal Code. To the extent that Judge Cudahy's marginal note expresses optimism for an early amendment of the legislation, I find myself unable to share in the expression. I particularly note the provision in the House version. I think the House Committee's observation that it does not wish to take a position in the controversy between the circuits is particularly distressing. The sole controversy between the circuits arises from the endeavor of the courts to determine what Congress meant in the existing statute. Congress now has a chance to make it clear what it means in the future and, in doing so, it is not taking anyone's side in a controversy. It is merely engaging, as is its particular governmental responsibility, in establishing future policy applicable to certain federal institutions.

BAUER, *Circuit Judge*, concurring.

For the reasons stated in the dissent in *Lono* and the subsequent history of similar problems in other circuits, I would prefer that this Circuit overrule *Lono en banc*. This desire, however, does not blind me to the fact that *Lono* is the present law of the Seventh Circuit and the instant decision is a step in the right direction. As a purely pragmatic matter, I approve of this movement and particularly its direction. A partial retreat from *Lono* is better than no retreat at all. Until, therefore, the problem is either remedied by Congress, the Supreme Court or our own Circuit, I concur in the present opinion.

Nos. 79-2362, 79-2488, 79-2361, 79-2363, 79-2369, 79-2364, 79-2365, 79-2366, 79-2367, 79-2368, 79-2370, 79-2371, 79-2374, 79-2410, 79-2411, 79-2412, 79-2485, 79-2486, 79-2487, 79-2531, 79-2532, 79-2533 & 79-2567

WOOD, *Circuit Judge*, concurring.

The panel opinion goes about as far as it reasonably can to resolve a situation which was not created by *Lono*, but by the Bureau of Prisons' obscure decision some time in the past to ignore the limitations enunciated by the Attorney General who proposed the legislation, the restricting comments of the Congress which adopted it, and the distinctive "treatment" language of the statute itself.

Even if I considered myself some kind of a federal ombudsman instead of a judge, I would send the problem back to the executive and legislative branches to determine as a matter of policy what is desired. If a national prison system instead of a federal prison system is to be enacted, it should be accomplished by the Congress and not the court. I do not believe it is up to judges to provide the states with an unlegislated method merely to permit them to avoid one of their most troublesome local responsibilities. States should be expected to take care of their own except within the limitations of the present statute until such time as Congress makes it clear that the Bureau of Prisons is authorized generally to go into the rent-a-prison business. That business, if approved, should prove to be a good one because the federal prison system is considered to be the best managed and most progressive penal system in the world. I believe that judgment to be well deserved. However, if our federal prison system is as overloaded as we often hear it is, I would hesitate to advertise for foreign clientele, particularly for those not wanted at home. The states, I believe, would be better served in the long run to emulate federal penal progress, rather than by just renting it.

The hearing required by the panel opinion I do not view as a mere charade to permit indiscriminate transfer of state prisoners to federal custody. In my judgment those hearings may be subject to further judicial review which suggests at least a minimum record must be kept.

A state prisoner who is injected without his consent into the federal nationwide penitentiary orbit away from

counsel, family and friends by reason of a bureaucratic decision unsupported by specific justification at a hearing, and all without clear congressional authorization, suffers a form of banishment which I decline to approve.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix B

Judgment—Oral Argument
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 23, 1980

Before

Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

Nos. 79-2362 and 79-2488
Dennis Ray Anthony,
Petitioner-Appellee,

vs.

George C. Wilkinson, Warden,
U.S. Penitentiary, Marion, Ill.,
Helene Beirne, Alaska
Commissioner of Health & Social
Services, and the Attorney
General of the State of Alaska,
Respondents-Appellants

Nos. 79-2361, 79-2363 & 79-2369
Roy J. Girouard, John H. Killary
and John E. Kasper,
Petitioners-Appellees,

vs.

George C. Wilkinson, Warden,
et al., Respondents-Appellants,
Cornelius D. Hogan,
Intervening Respondent.

Appeals from the United States District Court for the Eastern District of Illinois, Benton Division.

Nos. 79-C-2023, 79-C-2015, 79-C-2032, 78-C-2353, 78-C-2038, 79-C-2055, 79-C-2057, 78-C-2339, 78-C-2340, 78-C-2354 and 78-C-2373

Judge James L. Foreman

Nos. 79-2364, 79-2365, 79-2366, 79-2367, 79-2368, 79-2370, and 79-2371

Aubrey McKay, Carl Vincent Henry, William K. Mederios, Peter M. K. Lono, Donald A. Morgan, George Shimabuku, and Leo McGill,
Petitioners-Appellees,

vs.

George C. Wilkinson, Warden,
Respondent-Appellant.

No. 79-2374

Herbert William Lawrence,
Petitioner-Appellee,

vs.

Robert I. Elsea, Warden,
Respondent.

Cornelius D. Hogan,
Intervening Respondent-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin
No. 78-C-526
Judge James E. Doyle

Nos. 79-2410, 79-2411, 79-2412, 79-2485, 79-2486, 79-2487, 79-2531, 79-2532 and 79-2533

Roy J. Girouard, John H. Killary, John E. Kasper, Carl Vincent Henry, Aubrey McKay, Donald A. Morgan, William K. Mederios, Peter M. K. Lono and George Shimabuki,
Petitioners-Appellees,

vs.

George C. Wilkinson, Warden, et al.,
Respondents.

Cornelius D. Hogan, State of Delaware, State of Alaska, and State of Hawaii,
Intervening Respondents-Appellants.

Appeals from the United States District Court for the Eastern District of Illinois, Benton Division.
Nos. 79-C-2015, 79-C-2032, 78-C-2353, 79-C-2055, 79-C-2038, 78-C-2340, 79-C-2057, 78-C-2339, and 78-C-2354
Judge James L. Foreman

No. 79-2567
Herbert William Lawrence,
Petitioner-Appellee,

vs.

Robert I. Elsea, Warden,
Respondent-Appellant,
Cornelius D. Hogan,
Intervening Respondent.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 78-C-526
Judge James E. Doyle

This cause was heard on the record from the United States District Court for the Eastern District of Illinois, Benton Division, and the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Courts in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

Appendix C

In the United States District Court
for the Southern District of Illinois

Aubrey McKay, Petitioner, vs. George C. Wilkinson, Warden, USP, Marion, Illinois, Respondent.	No. CV 79-2038
George Shimabuku, Petitioner, vs. G. C. Wilkinson, Warden, United States Penitentiary, Marion, Illinois, Respondent.	No. CV 78-2354
Donald A. Morgan, Petitioner, vs. G. Wilkinson, Warden, Marion Federal Penitentiary, Respondent.	No. CV 78-2340

John H. Killary,
Petitioner,
vs.
George C. Wilkinson, Warden, U.S.P., Marion, Illinois, et al.,
Respondents.
No. CV 79-2032

Leo McGill,
Petitioner,
vs.
George C. Wilkinson, Warden, U. S. Prison, Marion, Ill.,
Respondent.
No. CV 78-2373

Carl Vincent Henry,
Petitioner,
vs.
George C. Wilkinson, Warden, Marion Federal Penitentiary,
Respondent.
No. CV 79-2055

Dennis Ray Anthony,
Petitioner,
vs.
George C. Wilkinson, Warden, U.S.P., Marion, Ill., et al.,
Respondents.
No. CV 79-2023

John Eugene Kasper, Petitioner, vs. George C. Wilkinson, Warden, et al., Respondents.	No. CV 78-2353
Roy J. Girouard, Petitioner, vs. George C. Wilkinson, Warden, et al., Respondents.	No. CV 79-2015
William K. Mederios, Petitioner, vs. G. C. Wilkinson, Warden, United States Penitentiary, Marion, Illinois, Respondent.	No. CV 79-2057
Peter M. K. Lono, Petitioner, vs. G. C. Wilkinson, Warden, United States Penitentiary, Marion, Ill. 62959, Respondent.	No. CV 78-2339

[Filed September 28, 1979]

REPORT AND RECOMMENDATION

MEYERS, Kenneth J.
United States Magistrate

This matter is before the Court following evidentiary hearings held in Marion, Illinois on May 7 and 8 of 1979. Each of the named Petitioners was afforded an individual hearing, but for purposes of this report, their cases are consolidated as identical claims are raised.

The Petitioners are currently incarcerated at the Marion United States Penitentiary. Each of the Petitioners was initially convicted and sentenced under state laws. Each Petitioner was thereafter transferred into the federal correctional system pursuant to 18 U.S.C., § 5003 and also pursuant to contracts between the respective state and federal governments.

In order to facilitate a clearer understanding of these cases, a short factual background of each Petitioner follows:

AUBREY McKAY

Petitioner was convicted of Manslaughter in the State of Delaware and sentenced to 30 years' imprisonment. In 1977, Petitioner was allowed several furloughs during which he committed a number of Kidnappings and Rapes for which he received sentences totaling 595 years. He fled the State and was later recaptured in New Jersey. Upon his return to Delaware, a large number of other inmates had their furlough privileges restricted. Apparently those inmates felt Petitioner was responsible for this loss, and it was determined that Petitioner could not be kept in cus-

tody safely within the State of Delaware. Contemporaneously, the federal courts in Delaware had ordered an end to the overcrowded conditions in the various Delaware facilities, *Anderson v. Redman*, 76-364. Petitioner was among 50 inmates that were consequently transferred to the Federal Bureau of Prisons pursuant to the Court's mandate. Petitioner was not provided a pre-transfer hearing.

GEORGE SHIMABUKU

Petitioner has an extensive criminal history beginning as a juvenile with Malicious Conversion and Larceny. As an adult, Petitioner has committed Murder on three separate occasions and is currently serving two life sentences without chance of parole. The prison officials in Hawaii have diagnosed Petitioner as a sociopath, having "one of the worst conduct records in Hawaii State Prison." He has had no work record while in state custody since he has been under the closest available supervision. In April of 1969, Petitioner was transferred to the federal system without a hearing. Petitioner continued to be a management problem and was transferred from the U. S. Penitentiary at Leavenworth to the U. S. Penitentiary at Marion for closer supervision.

DONALD A. MORGAN

Petitioner Morgan is presently serving a life sentence for First Degree Murder which he committed while on escape status. While in Alaskan custody, he proved to be a severe management problem; having escaped twice, assaulted another inmate, and been in possession of narcotics. In November 1976, the Classification Committee of

the Eagle River Correctional Center met and decided to transfer Petitioner to the federal system. This hearing did not consider whether the Petitioner was in need of specialized treatment nor if the federal institutions had such treatment facilities. Petitioner refused to be in attendance at this meeting. Petitioner was transferred to the Federal Penitentiary at Leavenworth, Kansas in February 1977. Shortly thereafter, he assaulted another inmate and was transferred to the Control Unit of Marion.

JOHN H. KILLARY

In 1974 Petitioner received a life sentence for the crime of Murder in the State of Vermont. In 1975 correctional authorities convened a meeting to consider whether Petitioner should be transferred to the federal system. At that meeting, from which Petitioner was voluntarily absent, it was determined that there were no community facilities in which to incarcerate Petitioner because of his long sentence and because he was in need of protective custody since he had informed on three other inmates. He was transferred to the U.S.P. at Marion in May of 1975. Petitioner has received numerous incident reports at Marion, including refusing to work, insolence to a staff member, unexcused absence from work, threatening an inmate, disruptive conduct, etc. In 1976 Marion authorities requested that Petitioner be transferred back to Vermont which was declined by Vermont.

LEO McGILL

Petitioner was convicted in early 1976 in the State of New Mexico. He was sentenced to a 75 to 275 year term for the offense of Armed Robbery. The state officials con-

sidered the Petitioner a very high security risk and transferred him because of this factor. Petitioner was not provided a pre-transfer hearing.

CARL VINCENT HENRY

Petitioner was convicted in 1971 of Assault with Attempt to Commit Murder and Possession of a Firearm in the Commission of a Felony. He was sentenced to a 20 year term by the state courts of Delaware. While incarcerated in the Delaware Correctional Facility, Petitioner received a 35 year consecutive sentence for Assault with Intent to Murder, Assaulting a Guard, and Conspiracy. Thereafter, he was sentenced in 1976 to a one year consecutive term for Attempted Escape. Finally, Petitioner was found guilty of Attempted Escape and was sentenced to a 13 year consecutive term in 1976. Petitioner was subsequently transferred to federal custody without a pre-transfer hearing.

DENNIS RAY ANTHONY

Petitioner was convicted of First Degree Murder in 1972 and sentenced to life imprisonment in the State of Alaska. In 1974 Petitioner escaped from Alaskan custody and committed the offense of Rape before being recaptured. While in Alaskan custody, Petitioner had eight institutional misconduct reports for such things as hostility towards officers, possessing contraband drug paraphanalia [sic], and possessing money. In 1975 Petitioner was transferred to federal custody after a hearing before three Alaskan correctional officials who concurred in the decision to place Petitioner with the U. S. Bureau of Prisons. This hearing

did not consider whether the Petitioner was in need of specialized treatment nor if the federal institutions had such treatment facilities.

JOHN EUGENE KASPER

Petitioner has an extensive criminal history extending over a period of 24 years. On October 28, 1976, he was sentenced to life imprisonment for Assault, Robbery, and Bodily Injury. His present sentence amounts to three concurrent life terms. Additionally, he has four convictions for Escape on 10/7/63, 6/27/67, 5/2/73, and 6/24/75. Mr. Kasper ultimately wound up at the St. Albon's Correctional Facility, the most secure penal institution in Vermont. It was decided by Vermont authorities that there was no institution in the State suitable to house Mr. Kapser [sic] on a long-term basis. A transfer hearing was had on 1/13/77, at which time it was concluded, *inter alia,* that Mr. Kasper had not responded to institutional programs for a 24 year period and that he was a dangerous assaultive person. It was also determined that he was an extreme escape risk and that due to the length of his sentence there were no feasible programs within the State. The most secure facility being St. Albon's "D" Wing which is designed for short-term detainees and has no rehabilitative programs. This hearing did not consider whether the Petitioner was in need of specialized treatment nor if the federal institutions had such treatment facilities.

On 1/25/77 the prison officials of the State of Maine refused to accept Mr. Kapser[sic] for incarceration pursuant to an interstate compact then in effect. Petitioner was

thereafter accepted into the federal system in June of 1977 at Leavenworth, Kansas. He was subsequently transferred to the U. S. Penitentiary, Marion, Illinois.

ROY J. GIROUARD

Petitioner was convicted of First Degree Murder and sentenced to life imprisonment in the State of Vermont in 1975. Prior to this conviction, Petitioner had a history of escapes from county jails and state prisons. He has been classified by state authorities as a management problem, as well as an escape and suicide risk. In February of 1976, Petitioner was given an out of state transfer hearing where it was determined that he would be delivered into federal custody. This hearing did not consider whether the Petitioner was in need of specialized treatment nor if the federal institutions had such treatment facilities. Petitioner arrived at the maximum security federal penitentiary in Marion, Illinois in March of 1976. Since then, he has been subject to the closest of custody for being a management problem and for possession of a knife.

WILLIAM K. MEDERIOS

Petitioner was convicted of Burglary in the First Degree and sentenced to a 20 year term in the State of Hawaii in 1967. Shortly afterwards he received a 10 year concurrent sentence for Possession of a Harmful Drug. While incarcerated, Petitioner was convicted of Escape in the Second Degree and Murder in the First Degree receiving a 5 year and life sentence respectively. Following a hearing, Petitioner was transferred into the federal system. Petitioner alleges that at his pre-transfer hearing he was advised

that he was being transferred because the federal system had treatment facilities; however, no showing was made that Petitioner required such treatment.

PETER M. K. LONO

Petitioner was sentenced in 1970 by the state courts of Hawaii to a term of from 12 to 99 years for Second Degree Murder. Following a hearing, Petitioner was transferred into the federal system. During this pre-transfer hearing, it was discovered that the reason behind the transfer was disciplinary in nature.

APPLICABLE LAW

The Petitioners claim that their transfers from the state into the federal correctional system violated the provisions of 18 U.S.C. § 5003(a). That statute reads:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

The Petitioners do not contest that the Attorney General certified that sufficient facilities were available; rather, Petitioners maintain that § 5003 authorizes the transfer of state prisoners to federal custody only upon a showing that the prisoner is in need of specialized treatment unavailable in the state system, and that due process

requires a hearing on that issue prior to such a transfer. They rely on the holding in *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978) as conclusive authority for their position. The court in *Lono* held that a liberty interest is created by § 5003 and that prior to any transfer into the federal system a hearing must be held. The decision in *Lono* is based upon the court's construction of the wording in § 5003(a). By a four-three split, the Court of Appeals in *Lono* deemed the language of § 5003 unambiguous and interpreted it to require a pre-transfer hearing. The three dissenting judges also deemed the language of the statute as equally unambiguous; however, their interpretation was in direct opposition to that of the majority.

During the evidentiary hearings, the Respondents have consistently utilized a two-prong argument. (1) The interpretation of § 5003(a) in *Lono* is erroneous. (2) Specialized treatment is indeed offered by Marion to these Petitioners which treatment is not available in the Petitioners' respective state systems.

In support of the first prong of their attack, the Respondents have advanced the sound arguments of Judge Bauer in his dissenting opinion in *Lono*.

> There is simply nothing in the language of the statute itself that "restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." H.R.Rep. No. 1663, 82d Cong., 2d Sess. 2 (1952), U.S. Code Cong. & Admin. News (1952), p. 1421. The majority opinion strains to find such language in the requirement that the Director of the Bureau of Prisons certify that "proper and adequate treatment facilities and person-

> nel" be available. That certification requirement, however, speaks only to the necessity for determining whether appropriate facilities and personnel would be available for handling any prisoners received and cannot reasonably be construed as placing a substantive limitation or restriction on the purposes for which prisoners may be transferred. Those purposes are set out in the statute itself and include simple "care, custody and subsistence," as well as specialized medical treatment and rehabilitative training. I think the language of the statute itself is clear on its face and should control any seemingly inconsistent legislative history.

Lono, supra at 649. We believe that Judge Bauer espouses the better view concerning the proper interpretation of § 5003(a).

It is also worthwhile to note that since the rendering of the decision in *Lono*, three separate courts, when confronted with the identical issue, have explicitly disagreed with the majority in *Lono*. *Sisbarro v. Warden, Mass. State Penitentiary,* 592 F.2d 1 (1st Cir. 1979); *Games v. Moran,* 468 F.Supp. 542 (D.R.I. 1979); *Fletcher v. Warden,* 467 F.Supp. 777 (D.Kan. 1979). In each of these three decisions, the courts relied principally upon Judge Bauer's lucid dissenting opinion.

Although the majority in *Lono* refused to disclaim their contention that the language of § 5003(a) is unambiguous, they, nonetheless, resorted to the legislative history of the statute to buttress their interpretation. Judge Bauer in his dissent as well as in an earlier unpublished opinion forcefully opposed their restrictive analysis of the relevant legislative history.

". . . (T)he apparent discrepancy between the clear language of the statute and its legislative history results from the fact that the committee reports on which *Lono* relies were more concerned with explaining the need for enacting the legislation than the substance of its uncontroversial mechanics. It seems likely that Congress intended the Bureau to have whatever authority it needed to deal with the particular historical problem that prompted the bill's introduction without unduly restricting the Bureau's administrative discretion in determining the types of prisoners it would contract to receive and the purposes for which it might assume federal custody over state prisoners. In any event, the Bureau's administrative construction of the act as not limiting the Bureau to accepting only those prisoners in need of specialized treatment is 'entitled to great weight and should be followed unless there are compelling indications that it is wrong.' *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals,* 523 F.2d 25, 36 (7th Cir. 1975). The Bureau, after all, itself drafted this statute, prompted its introduction in the Senate, and pressed it through Congress without amendment or, indeed, much debate. Moreover, upsetting the Bureau's settled and previously unchallenged administrative construction of the statute now—over 25 years after its enactment—jeopardizes long-standing contractual relationships with many States," *Lono v. Fenton, supra,* at 649 (dissenting opinion).

Section 5003 is included in the general provisions which precede the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. Neighboring sections of this Act have been amended or repealed, e.g., §§ 5005 and 5007. Section 5003 was amended in 1965 to define the term "State" as including "any State, territory, or posses-

> sion of the United States, and the Canal Zone." If Congress were at serious odds with the construction given the statute by the Bureau of Prisoners [sic] they surely would have made some change in the statutory language over the intervening quarter of a century since its passage. See *United States v. Stowe-Woodward, Inc.*, 306 F.2d 678 (1st Cir. 1962), *cert. denied* 371 U.S. 949, 83 S.Ct. 503, 9 L.Ed.2d 498 (1963). We are faced with a long-standing and consistent interpretation by the agency charged with administration of the statute and that interpretation is entitled to strong judicial deference. (Cases omitted).
>
> We do not controvert that the legislative history might suggest that Congress' understanding as to the manner in which the Bureau of Prisons would implement the statute was that only those state prisoners in need of specialized treatment would be housed in federal institutions. However, that understanding was not incorporated into the language of the statute and has not been added in the twenty-six years since its enactment. *Lono v. Fenton,* No. 77-1141 (7th Cir. February 21, 1978, unpublished (vacated on rehearing).

Fletcher, supra at 781-81. [sic]

Furthermore, *Lono* cited the following passage from the Congressional Records as authority for their position that a state inmate must be in need of specialized treatment unavailable in the state system prior to a transfer into the federal system. "In introducing the bill prior to its passage, Senator McCarran explained that it would authorize federal custody of state prisoners 'under certain conditions in a limited category of cases, . . .' 97 Cong. Rec. 13543 (1951)." Id. at 647. We believe, however, that the lan-

guage in a Congressional Record immediately preceding the quoted passage casts the Senator's remarks in a different light. "At the present time (sic) the Attorney General is authorized by law to make contracts with state officials for the purpose of temporary confinement of federal prisoners. The bill would authorize a more or less reciprocal arrangement whereby, under certain conditions in a limited category of cases, . . ." 97 Cong. Rec. 13543 (1951). A reciprocal arrangement implies an equal return or counteraction between both systems. No such arrangement can be envisioned under *Lono*'s interpretation. It is anomalous to require a showing of specialized treatment for one system but not for the other.

In support of their second prong, the Respondents proffered evidence establishing the absence of state facilities capable of effectively and adequately housing the Petitioners. The Respondents maintain that in situations where a state prisoner becomes unmanageable the state institutions are not able to properly care for them. Such situations arise when the state inmate is extremely hostile (i.e., assaults or murders other inmates) or prone to escape. Since the state correctional systems involved in the case at hand (Delaware, Hawaii, Alaska, Vermont, and New Mexico—each relatively small in total population, incarcerating an equally relatively small number of the type of inmates in issue) do not have the facilities to properly prevent such activity, they are constrained to either shackle the inmate or confine the inmate to his cell 24 hours a day, save an occasional 30 minute exercise period. (Respondents validly argue that these smaller state systems are, consequently, placed in an untenable position

because of *Lono*. On the one hand, in order to prevent escape or further killing, they must employ inhumane procedures exposing themselves to liability under the Eighth Amendment (as occurred in the State of Delaware, where by court order the state system was required to remove 50 inmates), or on the other hand, they can transfer the inmates into the federal system where *Lono* would immediately return them.)

In contra-distinction to the state facilities, the federal institution in Marion has been constructed precisely for such purposes. The security in Marion is the highest in the nation. Since the security is so effective, Marion is able to allow the inmates to leave their cells for the better part of the day. As a result, these inmates are able to participate in the various programs offered by the officials in Marion, including educational, work, and religious ones. Such programs will be denied to Petitioners once they are returned to their respective state institutions. Having no adequate facilities, the Petitioners will be required to spend the entire day within the confines of their cells. Consequently, the Respondents argue that the programs offered at Marion constitute the specialized treatment of § 5003; further than such "treatment" is unavailable in the state systems to the specific inmates in question.

Respondents' arguments in this regard, although adding weight to the proposition that *Lono* is in err [sic], nonetheless, is ineffective at this juncture. Assuming that Marion's programs fall under the ambit of specialized treatment, the holding in *Lono* is clear that that fact must be established prior to transfer into the federal system not

thereafter. (Whether or not Marion's programs fulfill *Lono's* requirement of treatment is unclear. In defining "treatment", *Lono* merely reiterates 18 U.S.C. § 5006(g) describing treatment as including (but not limited to) corrective and preventive guidance and training.) Moreover, an initial finding must be made whether or not the individual is in need of such treatment and that the state system does not possess such treatment facilities. As previously discussed, the Petitioners were not provided such an opportunity.

In conclusion, the Court of Appeals in this Circuit has overturned an established twenty-six year old administrative procedure, whereas in the past, the state correctional systems (especially the smaller ones) were able to send their most hardened and sophisticated criminals into the more secure federal institutions; *Lono* now imposes the requirement that a showing of specialized treatment must be established prior to such transfer. The petitions in the instant case are a result of that decision. This Court is bound by the closely divided (4-3) holding in *Lono*. It is not within the province of this Court to do other than follow their decision. *United States v. Rosebush*, 45 F.Supp. 664, 667 (N.D. Ill. 1953). This Court would be remiss in its duties, however, if we failed to register its disapproval of the *Lono* holding. We strongly believe that such a decision will not long endure. Moreover, the actual effect of *Lono* has been a mere administrative rerouting of prisoners. Once the state inmate is returned to his respective state, he is in turn forwarded to a federal

institution outside the jurisdiction of the Seventh Circuit (i.e., U.S.P. at Leavenworth, Kansas; see *Fletcher, supra*). Such administrative expense and waste is unfortunate.

Nonetheless, IT IS RECOMMENDED with reluctance that the Petitions be granted and the Respondents ORDERED to return the Petitioners to their respective state correctional systems within thirty (30) days. Upon failure to comply without just cause, writs of habeas corpus shall issue and the Petitioners discharged.

RESPECTFULLY SUBMITTED this 28th day of September, A.D. 1979.

/s/ Kenneth J. Meyers
KENNETH J. MEYERS
UNITED STATES
MAGISTRATE

CERTIFICATE OF SERVICE

This is to certify that the undersigned Magistrate mailed on this 28th day of September, 1979 a copy of the attached documents to all of the attorneys of record in this case. Pursuant to Title 28 U.S.C., 636(b) and Rule 38(b) of the Rules of Practice for the United States District Court, Eastern District of Illinois, any party may serve and file written objections to this Report and Recommendation within ten (10) days of service.

/s/ Kenneth J. Meyers
KENNETH J. MEYERS
UNITED STATES
MAGISTRATE

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Appendix D

In the District Court of the United States
for the Southern District of Illinois

Aubrey McKay, Petitioner, vs. George C. Wilkinson, Warden, USP, Marion, Illinois, Respondent.	No. CV 79-2038
George Shimabuku, Petitioner, vs. G. C. Wilkinson, Warden, United States Penitentiary, Marion, Illinois, Respondent.	No. CV 78-2354
Donald A. Morgan, Petitioner, vs. G. Wilkinson, Warden, Marion Federal Penitentiary, Respondent.	No. CV 78-2340
John H. Killary Petitioner, vs. George C. Wilkinson, Warden, U.S.P., Marion, Illinois, et al., Respondents.	No. CV 79-2032

Leo McGill, Petitioner, vs. George C. Wilkinson, Warden, U.S. Prison, Marion, Ill., Respondent.	No. CV 78-2373
Carl Vincent Henry, Petitioner, vs. George C. Wilkinson, Warden, Marion Federal Penitentiary, Respondent.	No. CV 79-2055
Dennis Ray Anthony, Petitioner, vs. George C. Wilkinson, Warden, U.S.P., Marion, Ill., et al., Respondents.	No. CV 79-2023
John Eugene Kasper, Petitioner, vs. George C. Wilkinson, Warden, et al., Respondents.	No. CV 78-2353
Roy J. Girouard, Petitioner, vs. George C. Wilkinson, Warden, et al., Respondents.	No. CV 79-2015

William K. Mederios, Petitioner, vs. G. C. Wilkinson, Warden, Respondent.	No. CV 79-2057
Peter M. K. Lono, Petitioner, vs. G. C. Wilkinson, Warden, United States Penintentiary, Marion, Ill. 62959, Respondent.	No. CV 78-2339

ORDER

FOREMAN, Chief Judge:

Before the Court is the Report and Recommendation of the United States Magistrate for the Southern District of Illinois, Kenneth J. Meyers, in the above captioned consolidated matter.

Suffice it to say that the issue before the court is not one of first impression. This Court has initially considered the pre-transfer hearing issue which was reversed by the Seventh Circuit in *Lono v. Fenton,* 581 F2d 645 (7th Cir. 1978). The Court carefully followed the appeal of the *Lono* decision, *Lono v. Fenton,* No. 77-1141 (7th Cir. 1978) unpublished (vacated on rehearing) published at 581 F2d 645 (7th Cir. 1978), and now reluctantly this Court must accept the *Lono* decision as Seventh Circuit law on this point.

The Court has carefully reviewed the record in each case, including the well reasoned objections filed by the defendant and the various intervenors. The Court feels that it can add little to the well reasoned Report and Recommendation of Magistrate Meyers, except to add that this Court heartily agrees with Judge Bauer's lucid dissenting opinion in *Lono* and with the subsequent cases from other circuits flatly rejecting *Lono*. *See, Sisbarro v. Warden, Mass. State Penitentiary,* 592 F2d 1 (1st Cir. 1978); *Gamee v. Moran,* 468 F.Supp. 542 (D.R.I. 1979); and *Fletcher v. Warden,* 467 F.Supp. 777 (D.C. Kan. 1979).

Since this Court is constrained to follow the law as set out by the Court of Appeals for the Seventh Circuit, there is little choice but to find a violation of the liberty interest established by *Lono* through 18 U.S.C. § 5003. Therefore, this Court, with grave reservations, ADOPTS the Report and Recommendation of the United States Magistrate.

IT IS SO ORDERED.

DATED: November 1, 1979.

/s/ James L. Foreman
CHIEF JUDGE

Appendix E

In the United States District Court
for the Western District of Wisconsin

Herbert William Lawrence, Petitioner, vs. Robert I. Elsea,[1] Warden, Respondent, Cornelius D. Hogan, Intervenor.	78-C-526
Peter L. Mulholland, Petitioner, vs. Robert I. Elsea,[1] Warden, Respondent, Cornelius D. Hogan, Intervenor.	79-C-203
Christopher E. Wetmore, Petitioner, vs. Robert I. Elsea,[1] Warden, Respondent, Cornelius D. Hogan, Intervenor.	79-C-206

[Filed Oct. 22, 1979]

[1]In petitions for writs of habeas corpus, the custodian must be named as respondent. 28 U.S.C. § 2242. Because Robert I. Elsea

ORDER

Petitioners Wetmore and Mulholland have brought civil actions in mandamus pursuant to 28 U.S.C. § 1651. Petitioner Lawrence has brought a habeas corpus action pursuant to 28 U.S.C. § 2241. Leave to proceed *in forma pauperis* has been granted petitioners.

Petitioners were convicted in Vermont state courts. They were transferred from Vermont state custody to federal custody under an agreement between the state of Vermont and the United States. These suits allege that this agreement and petitioners' transfers pursuant to this agreement are contrary to 18 U.S.C. § 5003.[2] As relief, petitioners ask for release from federal custody. The effect of an order granting such relief would be petitioners' return to Vermont state custody.

Preiser v. Rodriguez, 411 U.S. 475 (1973), held that a court must treat an action as one in habeas corpus when release from confinement is requested. Because petitioners are asking release from federal confinement, they have an

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has replaced Ogis Fields as warden at the Federal Correctional Institution at Oxford, Wisconsin, Warden Elsea has been substituted as respondent in these actions.

[2]18 U.S.C. § 5003 provides:

(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided,* That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

adequate remedy in habeas corpus. Therefore, I shall treat the three petitions together in this order as petitions for writs of habeas corpus.

In these three actions, respondent has submitted pleadings and briefs which are identical in all material respects. Cornelius Hogan, Commissioner of Corrections of the State of Vermont, has filed a motion for leave to intervene and a brief in support of that motion in each case. In all material respects, these motions and briefs are identical. Therefore, I assume that respondent and movant Hogan would have defended against petitioner Wetmore and Mulholland's actions in the same way had they been brought as habeas corpus actions. Therefore, I find that respondent and movant are not prejudiced by the change in nature of petitioner Wetmore and Mulholland's motions.

Motion for Leave to Intervene

Cornelius D. Hogan, Vermont Commissioner of Corrections, has moved for leave to intervene as a respondent in these actions.[3] That motion was brought pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, which provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
>
> . . .
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or

[3]Respondent Elsea neither opposes nor supports this motion.

> impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Petitioners and movant Hogan agree I must test this claimed right to intervene against the following standards:

(1) Movant must claim an interest relating to the property or transactions which is the subject of the action;

(2) Movant must be so situated that the disposition of the action may impair his ability to protect that interest; and

(3) Movant must demonstrate that the existing parties inadequately represent this asserted interest. Wright & Miller, *Federal Practice and Procedure: Civil*, § 1908.

Petitioners concede that requirements (1) and (2) have been met in this case, but they contend that requirement (3) has not been met and that the motion for leave to intervene should be denied. Petitioners rely on *United States v. Board of School Commissioners, Indianapolis, Indiana*, 466 F.2d 573 (7th Cir. 1972), *cert. denied sub nom., Citizens of Indianapolis for Quality Schools, Inc. v. United States*, 410 U.S. 909 (1972), in which the court found:

> . . . [R]epresentation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty.

Id. at 575 (quoting *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969)).

However, in *Trbovich v. Mine Workers,* 404 U.S. 528 (1972), the Court applied a different standard than that used by the Seventh Circuit in *United States v. Board of School Commissioners.* The *Trbovich* Court held movant must show only "that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* at 538 p. 10. *See also* 3B *Moore's Federal Procedure* § 24.09-1[4] (1969). Movant's burden under this standard is not as great as it would be under the test announced by the Seventh Circuit in *United States v. Board of School Commissioners.* I am bound to follow the test announced by the United States Supreme Court.

Movant Hogan argues that he has an interest unique to him in preserving the ability to transfer Vermont State maximum security prisoners to the federal prison system. I infer from this argument that movant believes his interest will not be protected adequately by respondent Elsea. I am persuaded by this argument. Respondent Elsea's interest is in defending the United States Bureau of Prison's (BOP) right to contract with state correctional offices for agreements such as the one between the United States and the State of Vermont. That interest is of a different character and magnitude from the interest of movant in maintaining Vermont's right so to contract.

I find this state interest may not be represented adequately by respondent Robert Elsea. I shall grant movant leave to intervene in this action.[4]

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[4]Petitioners have expressed concern that allowing intervention will alter the issues before me in this lawsuit. Materials submitted by intervenor Hogan prompted this concern. These materials ad-

FACTS

Based on all pleadings and affidavits submitted in these cases, I find there is no genuine issue as to the following material facts:

Petitioners have been convicted of serious felonies and have been found to require maximum security incarceration.

On approximately April 27, 1977, the Vermont Department of Corrections transferred petitioner Wetmore to the custody of the BOP. On approximately January 27, 1979, the Vermont Department of Corrections transferred petitioner Mulholland to the custody of the BOP. On approximately February 28, 1978, the Vermont Department of Corrections transferred petitioner Lawrence to the custody of the BOP.

Petitioners were transferred under the purported authority of 18 U.S.C. § 5003, 28 Vermont Statutes Annotated § 706,[5] and an agreement between the United States and

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dressed the problems which will befall the Vermont Department of Corrections if I grant relief to petitioners.

The fact that Mr. Hogan made such arguments will not affect the outcome of these petitions. The issues presented by petitioners and answered by respondent are the issues to be decided here. To the extent that respondent Hogan addressed these issues, his pleadings, briefs and affidavits will also be considered.

[5]28 V.S.A. § 706 provides:

(a) The commissioner may enter into and execute a contract or contracts with the United States for the transfer of any inmate from any facility to a federal correctional facility when, in his opinion, the inmate needs particular treatment or special facilities available at the federal correctional facility; or, all in-state treatment and rehabilitative programs available for the inmate have been considered and found unsuitable; or, all in-state security and custody alternatives for the inmate have been considered and found unsuitable; or, the inmate voluntarily requests transfer.

the State of Vermont. The transfers were against petitioners' will. Petitioners are now confined at the Federal Correctional Institution at Oxford, Wisconsin (FCI-Oxford), where they are serving their Vermont state sentences. Petitioners were transferred to BOP custody because Vermont treatment and rehabilitation programs had been determined unsuitable for petitioners and because Vermont correctional facilities had inadequate security for the protective custody of petitioners.[6]

Petitioners had pre-transfer hearings conducted by Vermont prison officials. These hearings were held in accordance with Vermont Department of Corrections Policy No. 891. That policy establishes three criteria for transfer of Vermont prisoners to federal custody:

> 1. All in-state treatment and rehabilitation programs available for that individual have been considered and determined unsuitable.
>
> 2. All in-state alternatives in the area of security have been considered and found unsuitable for providing the required degree of security or protective custody for a particular resident.
>
> 3. A resident voluntarily requests transfer.

At their Vermont hearings, petitioners were found to meet criteria one and two. They met these criteria because

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[6]Petitioners Wetmore and Mulholland assert they were transferred for these reasons. In his reply, intervenor disputes this statement of the reasons for the transfers, referring the court to the affidavit of intervenor and the documents attached to that affidavit. The affidavit and documents state the same reasons for the transfers as do petitioners' complaints. Therefore, I find petitioners' statements of fact to be the ones which prompted the transfers.

there was no long-term, maximum security prison in Vermont. Because there was no such facility, treatment and programs available to minimum and medium security prisoners in Vermont were not available to petitioners. Because the federal prison system has maximum security facilities, it also has treatment and programs for maximum security prisoners.

The United States did not afford petitioners a pre-transfer hearing. Neither the United States Attorney General nor the Director of the Bureau of Prisons made any finding that petitioner Wetmore, petitioner Mulholland or petitioner Lawrence required specialized treatment available in the federal prison system but unavailable in the Vermont prison system. No facts are before the court which show that any of these petitioners has any such specialized treatment needs.

At no time has the Vermont Department of Corrections or the BOP informed petitioners of any specialized treatment available to petitioners at FCI-Oxford but unavailable in the Vermont prison system.

The state of Vermont and the United States entered into an agreement for the transfer of Vermont maximum security prisoners to federal custody. As amended, that agreement provides:

> (1) Relying on this agreement, the State of Vermont would close its only maximum security prison;
>
> (2) The Director of the BOP certified federal prisons could house Vermont prisoners in need of close supervision (maximum security);

(3) Without prior federal approval, Vermont officials could transfer a maximum of 40 prisoners to a BOP facility. The BOP would provide complete care for these prisoners and afford them all program opportunities available to federal prisoners;

(4) Unless otherwise agreed, Vermont state prisoners transferred under this agreement would be delivered to the Metropolitan Correctional Center—New York. Thereafter, BOP officials would transfer such prisoners to a federal prison appropriate for their custody, care and treatment;

(5) The State of Vermont could demand immediate custody of any prisoner transferred under this agreement and either party could terminate this agreement upon reasonable notice and subject to certain specified conditions.[7]

At this time, the State of Vermont has no maximum security prison. Vermont does have limited space for the short-term housing of maximum security prisoners in its medium security prison at St. Albans, Vermont. However, in the case of prisoners with long sentences who are in need of close supervision, federal BOP facilities offer security and prisoner programs which are unavailable in the Vermont prison system.

OPINION

In his brief and affidavits, intervenor Hogan states that prison authorities are suited to make decisions regarding prison management and that courts are not so suited. He also states that recently, many courts have adopted a

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[7]These conditions are irrelevant to decision in this case.

"hands-off" attitude in prisoner civil rights cases. I express no opinion on the correctness of these views. I note only that, were they entirely correct and controlling in federal courts, they would have no effect on the decision in these cases. The court is not now faced with decisions by prison officials which allegedly impinge on inmates' constitutional rights. Nor is the court faced with questions about the constitutionality of the treatment afforded inmates in prison. The issue to be decided has no constitutional dimension. It is a statutory question. I am confident that neither the Supreme Court nor any lower federal court would entertain the idea that, on a question of statutory interpretation, courts should pay more deference to prison officials' interpretations than it should to an interpretation by any other government official. I must judge § 5003's meaning as I would judge the meaning of a statute in any other case.

The issues for decision in this opinion are:

(1) Whether 18 USC § 5003 authorizes transfer of a state prisoner to the federal prison system without a hearing and a finding by the BOP that the prisoner needs specialized treatment which is available in the federal system and unavailable in the state system; and

(2) If so, whether the BOP found that petitioners Wetmore, Mulholland and Lawrence presented such specialized treatment needs.

In 1978, the Seventh Circuit Court of Appeals decided *Lono v. Fenton,* 581 F.2d 645 (7th Cir. 1978). In *Lono,* petitioner had been transferred from State of Hawaii Cus-

tody to United States Custody pursuant to Hawaii Revised Statutes § 353-18 and a contract between the State of Hawaii and the United States. This transfer was made without the consent of petitioner and without a hearing.

Petitioner was a citizen of Hawaii. He argued a pre-transfer hearing was necessary because he suffered a grevious loss when he was transferred from a Hawaii state prison to a federal prison outside the state. Recognizing that, after *Meachum v. Fano,* 427 U.S. 215 (1976), a claim of such grievious loss does not automatically mandate a hearing, petitioner also argued that § 5003 forbade such transfers unless the BOP made a pre-transfer finding that the prisoner had specialized treatment needs, the BOP could fulfill those needs, and the State of Hawaii could not.

Lono contains an extended discussion of § 5003's legislative history and an examination of case law interpreting § 5003.[8] I find it unnecessary to repeat these discussions here. The court concluded:

> It was not intended by Section 5003 to put the federal government in the rent-a-prison business unless there was some special treatment need with which the state required assistance. Absent that special need the states were left to care for their own.

581 F.2d at 648.

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[8]Intervenor argues that the *Lono* court relied on legislative history in deciding for petitioner. That is not the case. *Lono* was decided based on the plain meaning of § 5003. The court's discussion of legislative history was dicta, included because respondent had argued that the legislative history of § 5003 required decision in his favor. The court concluded the legislative history as well as the plain meaning of § 5003 supported petitioner's position. *Lono v. Fenton, supra* at 647.

The *Lono* court held a BOP hearing was necessary before a state prisoner could be transferred to federal custody. The court stated that at such a hearing a finding must be made that the prisoner would be afforded specialized treatment in the federal prison system which was not available to him in the state prison system. I am bound by the Seventh Circuit's decision in *Lono*.[9]

Federal prisons may confine persons only in accordance with an Act of Congress. 18 U.S.C. § 4001(a). Section 5003 is the only provision for the transfer of a state prisoner to the federal system. I now hold that unless the Attorney General or the Director of the BOP made a pre-transfer finding, after a hearing, that petitioners needed specialized treatment available to them in the federal prison system, but unavailable in the State of Vermont prison system, petitioners' transfers did not comply with 18 U.S.C. § 5003 and were unlawful.

Intervenor argues that the Vermont hearing provided each petitioner is sufficient "as a matter of law," as a finding of specialized treatment need and availability. I could not accept that statement without first accepting intervenor's argument that petitioner's need for confinement in a maximum security prison constitutes a need for special-

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[9]Intervenor Hogan invites the court to hold that *Lono* was incorrectly decided. In his briefs, intervenor argues that the *Lono* interpretation of § 5003 is contrary to the great weight of authority. Of the cases cited by intervenor, only one dealt with the question before the court. In *Sisbarro v. Warden*, 592 F.2d 1 (1st Cir. 1979), the court rejected the *Lono* reasoning and held that BOP authorities had wide discretion to accept state prisoners into the federal prison system. As I am bound to follow the decision of the Seventh Circuit, I must reject the decision of the First Circuit.

ized treatment under § 5003.[10] However, it is not necessary for me to decide that question. Section 5003 requires that the Attorney General, after certification of treatment need by the Director of the BOP, may contract for the housing of state prisoners in federal prisons. Thus, it is clear, from the language of § 5003, that the finding of specialized treatment need must come in each case from the Director of the BOP. In the present cases, the United States accepted these prisoners without any such finding. By the terms of the agreement between the United States and Vermont, the United States had no discretion to accept or to reject prisoners based on treatment availability, treatment need, or on any other criterion.

Even were the Vermont procedure adequate, it would not substitute for the statutorily mandated BOP finding. The Vermont state findings, after a hearing in each of these cases, included general statements that petitioners could not be incarcerated at the proper security level in Vermont institutions. Such general findings do not support respondent's and intervenor's position that the requirements of § 5003, as interpreted in *Lono*, have been met. The BOP may not rent prison space to states at the convenience of the BOP and the states. It is just such a "rent-a-prison" system which the *Lono* court specifically condemned. I now hold that the BOP failed to comply with

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[10]Treatment, as used in § 5003, includes the provision of medical care and "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of . . . offenders." H.R. Rep. No. 1663 at 2, (1952) U.S. Code Congressional and Administrative News, at 1421 (quoting 18 U.S.C. § 5006f (amending 18 U.S.C. § 5006g) (1952)).

18 U.S.C. § 5003 when it accepted custody of petitioners pursuant to its agreement with the State of Vermont and with no finding of specialized treatment needs.

Therefore, these writs of habeas corpus shall issue. It is ordered that the United States Bureau of Prisons release petitioners Wetmore, Mulholland and Lawrence to the custody of the Vermont Division of Corrections within 30 days of the date this order is signed. Upon failure to comply with this order, without just cause, respondent Elsea shall discharge petitioners from custody.

Entered this 19th day of October, 1979.

By the Court:

/s/ James E. Doyle

District Judge

APPENDIX F

In the United States Court of Appeals For the Seventh Circuit

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No. 77-1141

KENNETH LONO,

Petitioner-Appellant,

v.

CHARLES A. FENTON, WARDEN, MARION FEDERAL PENITENTIARY,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois
Civ. No. 76-3003—**Hon. James L. Foreman**, *Judge.*

ARGUED SEPTEMBER 16, 1977—DECIDED FEBRUARY 21, 1978

Before PELL, BAUER and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* Petitioner Lono, an inmate of the federal penitentiary at Marion, Illinois, appeals from the district court's denial of his application for a writ of habeas corpus, which seeks his return to the Hawaii state penitentiary where he was originally incarcerated after pleading guilty to murder and robbery charges in an Hawaii state court. He argues that 18 U.S.C. § 5003 authorizes the transfer of state prisoners to federal custody only upon a showing that the prisoner is in need of specialized treatment unavailable in the state system, and that due process requires a hearing on that issue

prior to any administrative transfer. Alleging that he was denied a hearing in connection with his transfer, Lono asks that a writ of habeas corpus issue directing his return to the Hawaii state prison system.

Because we disagree with petitioner's contention that 18 U.S.C. § 5003 conditions any administrative transfer on a showing of need for specialized treatment, we affirm the district court's denial of Lono's petition.

I

Following his convictions in an Hawaii state court for murder and armed robbery, Lono was incarcerated in the Hawaii state penitentiary until October 22, 1967. On that date he was transferred to the federal penitentiary at Leavenworth, Kansas under the provisions of a contract between state and federal officials that was authorized by Hawaii Revised Statutes § 353-18 and 18 U.S.C. § 5003. On July 19, 1968, Lono was transferred to the federal prison at Lewisburg, Pennsylvania and, on February 2, 1969, to the federal penitentiary at Marion, Illinois.

The parties have stipulated that Lono has never received any hearing on, or a statement of the reasons for, his transfer from the state to the federal prison system. Lono testified at an evidentiary hearing held by the district court that, as a result of his transfer to federal prisons on the mainland, he has been unable to see any of his friends or family for over ten years. Even more serious, he has been unable to communicate with counsel familiar with Hawaiian law so that he can petition for resentencing under the provisions of a 1972 amendment to the Hawaii Penal Code. Moreover, he is unable to formulate such a petition on his own because the Hawaiian legal materials he needs to do so are not available at the federal penitentiary at Marion.

On appeal, Lono argues that, because his transfer from state to federal facilities imposed a "grevious" loss on him, he was entitled under the due process clause to a hearing on the need for his transfer. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*,

408 U.S. 471 (1972). He recognizes that *Meachum v. Fano*, 427 U.S. 215 (1976), establishes that, if the state and federal officials had administrative discretion to transfer him for any reason or no reason at all, his due process claim would have no merit. He contends, however, that *Meachum* is distinguishable because 18 U.S.C. § 5003 conditions the authority of federal officials to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system. Accordingly, Lono argues that, because the statute conditions any administrative transfer on his need for specialized treatment, he is entitled to a hearing on that issue both by the due process clause and the statute itself.

The respondent agrees with Lono that, if 18 U.S.C. § 5003 is construed to require a showing of a prisoner's need for specialized treatment as a condition precedent to his administrative transfer, then Lono would be entitled to a hearing on that issue. Respondent disagrees, however, that the statute should be so construed.

Petitioner's claims, thus, turn on our construction of the statute.

II

The statute at issue provides in relevant part:

> "(a) The Attorney General, when the Director [of the Federal Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved." 18 U.S.C. § 5003.

Lono argues that, because the statute on its face authorizes transfers only when "proper and adequate

treatment facilities and personnel" are available, it necessarily follows that the only authorized purpose for any transfer is the provision of specialized treatment.

In support of his argument, Lono notes that the Senate Report on the proposed legislation states that the bill was introduced at the request of the Bureau of Prisons so that federal officials would be able to honor requests from state officials

> "to undertake the custody, treatment, and training of state prisoners where specialized types of institutions and training programs are indicated but not available to the States." S. Rep. No. 978, 82d Cong., 1st Sess. 1-2 (1951).

Lono also notes that the Senate passed the bill as drafted by the Bureau, and that its sponsor explained the bill to the Senate as authorizing the Bureau to accept state prisoners into federal custody "under certain conditions in a limited category of cases." 97 Cong. Rec. 13543 (1951) (remarks of Sen. McCarran). Furthermore, Lono points out that the House Report on the bill states:

> "The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term 'treatment' as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act." H.R. Rep. No. 1663, 82 Cong., 2d Sess. 2 (1952), *reprinted in* [1952] U.S. Code & Adm. News 1420, 1421.

Lono contends that the above legislative history makes clear that Congress intended that transfers of prisoners from state to federal custody be allowed only for the purpose of providing the prisoners specialized treatment. He argues that, as the House Report states, 18 U.S.C. § 5003 "restricts or limits the use of Federal prison facilities to those convicted State offenders in need of treatment," meaning specialized medical care or rehabilitative training. As there has been no showing that Lono is in need of such treatment, he claims that he is entitled to release from federal custody or at least a hearing on whether he should remain there because he is in need of such specialized treatment.

No. 77-1141

III

Notwithstanding the supportive legislative history on which Lono relies, we disagree with his contention that the statute should be construed to require a showing of need for specialized treatment as a condition precedent to any administrative transfer of state prisoners into federal custody. On its face the statute simply authorizes federal officials to contract with the States "for the custody, care, subsistence, education, treatment, and training" of any state prisoners transferred to federal custody. The only conditions that Congress actually imposed on the Attorney General's authority to enter such contracts are that the Director of the Bureau of Prisons certify that "proper and adequate treatment facilities and personnel" are available, and that the federal government be reimbursed for the care and custody given state prisoners. Those conditions were met in the instant case.

To be sure, the legislative history might suggest that it was Congress's understanding that the Bureau of Prisons would not in practice open its facilities to any state prisoners without first determining that the prisoners transferred were in need of "specialized treatment" as petitioner means it. But, even if that is so, Congress's understanding as to the manner in which the Bureau would implement the statute was not incorporated into the legislation that was enacted. There is simply nothing in the language of the statute itself that "restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." H.R. Rep. No. 1663, 82d Cong., 2d Sess. 2 (1952). Lono strains to find such language in the requirement that the Director of the Bureau of Prisons certify that "proper and adequate treatment facilities and personnel" be available. That certification requirement, however, speaks only to the necessity for determining whether appropriate facilities and personnel would be available for handling any prisoners received and cannot reasonably be construed as placing a substantive limitation or restriction on the purposes for which prisoners may be transferred. Those purposes are set out in the statute itself and include simple "care,

custody and subsistence," as well as specialized medical treatment and rehabilitative training. We think the language of the statute itself is clear on its face and should control any seemingly inconsistent legislative history.

Moreover, we believe the apparent discrepancy between the clear language of the statute and its legislative history results from the fact that the committee reports on which Lono relies were more concerned with explaining the need for enacting the legislation than the substance of its uncontroversial mechanics. It seem likely to us that Congress intended the Bureau to have whatever authority it needed to deal with the particular historical problem that prompted the bill's introduction without unduly restricting the Bureau's administrative discretion in determining the types of prisoners it would contract to receive and the purposes for which it might assume federal custody over state prisoners. In any event, we believe the Bureau's administrative construction of the Act as not limiting the Bureau to accepting only those prisoners in need of specialized treatment is "entitled to great weight and should be followed unless there are compelling indications that it is wrong." *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25, 36 (7th Cir. 1975). The Bureau, after all, itself drafted this statute, prompted its introduction in the Senate, and pressed it through Congress without amendment or, indeed, much debate. Moreover, upsetting the Bureau's settled and previously unchallenged administrative construction of the statute now—over 25 years after its enactment—would jeopardize longstanding contractual relationships with many States. Accordingly, though petitioner's argument is not an unreasonable one in light of the legislative history on which he relies, we believe great deference is due the Bureau's administrative construction of its own enabling legislation, especially as that construction is more consistent with the plain language of the statute than petitioner's. *Paden v. Department of Labor*, 562 F.2d 470, 473 (7th Cir. 1977), quoting *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408 (1961).

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For the reasons noted above, we hold that 18 U.S.C. § 5003 does not limit the transfer of state prisoners into federal custody to those who are in need of specialized medical care or rehabilitative treatment. Accordingly, the judgment of the district court is

AFFIRMED.

WOOD, *Circuit Judge*, dissenting. Without need of repetition here, the majority opinion fairly sets forth the petitioner's interpretation of the statute, the legislative history he relies upon, and the serious consequences to him prompting his challenge. I agree with the petitioner's views. It was not intended by the statute to put the federal government in the rent-a-prison business unless there was some special treatment need. Absent that special need, the states are expected to care for their own. Petitioner, a state prisoner, appears to be visiting various federal prisons without any known justification. I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1777

ARTHUR JOSEPH BESHAW,
Appellant

v.

CHARLES FENTON, Warden
U. S. Penitentiary, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(C.A. No. 79-0063)

Argued October 6, 1980

Before: SEITZ, *Chief Judge*,
ADAMS and HIGGINBOTHAM, *Circuit Judges*.

(Filed December 15, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

In this appeal, a prisoner convicted in a state court and originally incarcerated in a state prison challenges his transfer to federal custody on the ground that the applicable federal statute did not authorize it, and on the further ground that the hearing preceding the transfer was inadequate.

FACTS:

Arthur Beshaw was convicted in the Vermont state courts for the crime of breaking and entering, and at a later trial of attempted escape and related charges. He was sentenced to a total of twenty-two years, six months and twenty-four days in prison. Originally, Beshaw was confined in Vermont's maximum security prison at Windsor, Vermont. When Vermont decided to phase out its 175-year old Windsor facility, the Vermont Department of Corrections contracted with the Federal Bureau of Prisons to transfer to federal custody those state prisoners who could not be accommodated at other state institutions. Pursuant to this agreement, Beshaw was sent to the Federal Correctional Institution at Petersburg, Virginia. Before he was transferred, Beshaw was given a pre-transfer hearing by the Vermont Department of Corrections.

For disciplinary and security reasons, Beshaw was subsequently moved to federal facilities in Wisconsin, Illinois, Pennsylvania, and Indiana. On June 11, 1980, Beshaw was transferred to the Massachusetts Correctional Institution, Walpole, Massachusetts. The shift to the Massachusetts institution was made in accordance with an agreement between the Federal Bureau of Prisons and the State of Massachusetts authorizing the transfer of federal prisoners to Massachusetts state facilities.

In January 1979, while confined in the federal penitentiary at Lewisburg, Pennsylvania, Beshaw filed a petition for a writ of habeas corpus with the District Court for the Middle District of Pensylvania. Beshaw challenged his move from the Vermont prison system to federal custody, on the ground that this transfer was not authorized by federal statute. Beshaw also averred that the pre-transfer hearing accorded him by the Vermont Department of Corrections was inadequate to satisfy the requirements of due process.

On January 24, 1979, the United States Magistrate issued a report recommending that the writ be denied. He found that Beshaw's transfer was lawful and involved an "administrative matter best left to the discretion of prison officials rather than the courts." This report was adopted by the district judge, who, on February 9, 1979 issued an order denying the writ. A notice of appeal was filed from the district court's decision on February 22. On March 7, the district court certified that the appeal was not being taken in good faith. This Court, however, issued a certificate of probable cause on June 7, 1979, and the appeal was docketed.[1]

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1. Oral argument in this case was not heard until October 6, 1980. The unusually long delay between the docketing of the appeal and oral argument resulted from the failure of the government to file a timely brief. Beshaw's brief was received and filed in this Court on October 4, 1979. Although Warden Fenton was purportedly served by certified mail with a copy of Beshaw's brief, no brief on behalf of Warden Fenton had been received by this Court as of February 22, 1980. At that time the warden was informed that the case would be listed for disposition on appellant's brief only, unless a brief on his behalf was filed within thirty days. The government subsequently moved for and was granted leave to file its brief out of time; the government's brief was received by the Court on September 2, 1980.

Such long delays between the taking of an appeal and its final disposition are particularly regrettable when the rights of the imprisoned are at issue.

DISCUSSION:

A. *Mootness*

Because Beshaw is presently confined at a Massachusetts state facility, we must consider initially whether his challenge to the transfer from a Vermont state institution to federal prison is moot. In *Preiser v. Newkirk*, 422 U.S. 395 (1975), the Supreme Court ruled that a prisoner's challenge to a transfer from a New York state medium security prison was rendered moot by his retransfer to a minimum security prison within New York and by the fact that he would be eligible for parole in a short time. The Court determined that there was no reasonable expectation that the wrong would be repeated, and that the questions presented did not fall within that category of harm capable of repetition yet evading review.

We find the case at hand distinguishable from *Preiser*. While Beshaw is no longer in federal custody,[2]

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2. Although we refer throughout this opinion to Beshaw's having been in "federal custody" while confined at federal correctional institutions, and in "state custody" while confined in the state prisons of Vermont and Massachusetts, the use of this terminology might be questioned. In *United States v. Thompson*, 562 F.2d 232 (3d Cir. 1977) (en banc), Judge Garth observed that determining who has "custody" of a particular prisoner often "will raise questions of metaphysical subtlety." Among the examples he provided was the situation presented in this case: "In whose 'custody' is a person who has been convicted of state offenses but who is confined in a federal facility pursuant to a contract between the respective jurisdictions? Under 18 U.S.C. §5003(a), the '*custody*,' care etc. of such persons is committed to the Attorney General of the United States. But I would suspect that most states would regard all persons imprisoned for state offenses as being in state 'custody.' " *Id.* at 241-42 (Garth, J., dissenting).

Ascertaining whether Beshaw was in state or federal custody after his transfer to federal prison might appear to be of more than academic interest. Beshaw's petition for a writ of habeas corpus was made pursuant to 28 U.S.C. §2241 rather than 28 U.S.C. §2254, and was filed while Beshaw was confined in the federal prison at

his transfer from a federal prison system to the Massachusetts state was made pursuant to an agreement between the Federal Bureau of Prisons and the State of Massachusetts. The State of Vermont is not a party to

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Lewisburg, Pennsylvania. If, however, Beshaw was in state custody at the time of filing, it is arguable that he should have petitioned the court pursuant to §2254, and would have been subject to that section's requirement of exhaustion of state remedies. There is no indication in the record that Beshaw has presented his federal claims to a Vermont state tribunal.

The few cases that have considered the question have held that a prisoner confined in federal prison pursuant to a §5003 transfer remains in "state custody" and cannot avail himself of habeas corpus relief absent proof that he has exhausted state remedies. *See* Stearns v. Parker, 469 F.2d 1090 (9th Cir. 1972).

We need not decide, however, whether Beshaw's confinement is more appropriately characterized as state or federal. The exhaustion requirement of §2254 is not a jurisdictional prerequisite, and courts may deviate from it in those cases where justice so requires. Ballard v. Maggio, 544 F.2d 1247 (5th Cir. 1977); U.S. *ex rel.* Graham v. Mancus, 457 F.2d 463 (2d Cir. 1972); U.S. *ex rel.* Speaks v. Brierly, 417 F.2d 597 (3d Cir. 1969), *cert. denied*, 397 U.S. 1051 (1970). Even assuming that Beshaw was in state custody at the time he filed his petition, the circumstances of this case suggest that discretionary suspension of the exhaustion requirement would be appropriate. Beshaw's appeal has been before this Court for over one year, because of the failure of the government to file a timely brief, *see* note 1 *supra*, and imposition of an exhaustion requirement at this juncture would delay further the adjudication of his claims. In addition, we note that the government has not objected to federal jurisdiction on the ground that Beshaw has failed to exhaust state remedies.

Moreover, the comity considerations underlying the exhaustion requirement, *see* U.S. ex rel. Speaks v. Brierly, 417 F.2d 597, 599-600 (3d Cir. 1969); Gockley v. Meyers, 411 F.2d 216 (3d Cir. 1969), are not applicable to the present appeal. Beshaw does not assert error in his state court trial that would best be directed first to the state court system for an opportunity to consider the issue. Instead, Beshaw objects to a transfer from state to federal custody — a transfer in which federal as well as state officials had a hand. Under the circumstances of this case, it does not demean the integrity of the Vermont state courts for Beshaw's federal law claim to be heard as an initial matter in federal court.

that agreement, although Vermont officials were consulted before Beshaw was transferred into Massachusetts custody. Beshaw's present confinement in Massachusetts is thus a consequence of the transfer from Vermont to federal custody, the very transfer that he attacks, and there is no indication in the record that Beshaw's present confinement in Massachusetts could have come about had he not been transferred first to federal custody in the way he claims was unlawful.

In addition, federal officials retain discretion to return Beshaw to federal custody. Unlike *Preiser*, there is in the present situation a distinct possibility that Beshaw will once again suffer the "wrong" of which he complains, namely, transfer to a federal facility. Counsel for the government stated at oral argument that Beshaw would likely be moved to a federal institution if a position at a suitable facility became available. In light of these circumstances, we find that Beshaw's claim is still alive and that his appeal is not moot. *Cf. Ali v. Gibson*, Nos. 80-1189/1190 (3d Cir. Oct. 2, 1980) (challenge to conditions of confinement at federal prison from which petitioner had been transferred not moot, since it was likely that petitioner would be transferred back to federal prison).

B. *The Lawfulness of Beshaw's Transfer into Federal Custody*

Beshaw's principal contention is that his movement from the Vermont prison system into federal custody was without statutory authority under 18 U.S.C. §5003, the provision governing transfers of state prisoners to federal control. Section 5003 provides in pertinent part:

> The Attorney General, when the Director [of the Federal Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custo-

> dy, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory.

Beshaw maintains that the statute authorizes the transfer of state prisoners only in those instances where specialized treatment is required and is available at federal, but not at state, institutions. Since his transfer was not for treatment purposes, Beshaw argues that it was not authorized by Section 5003, and that he should be returned to the custody of Vermont state officials.

The federal courts of appeals have divided in their interpretation of Section 5003. In *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978) (en banc), the Seventh Circuit, by a 4-3 vote, held that the authority of federal officials to accept a state prisoner pursuant to Section 5003 is conditioned on a showing that the prisoner is in need of specialized treatment available only in the federal correctional system. The court noted that Section 5003 refers to the availability of "proper and adequate *treatment* facilities and personnel," and concluded that "it necessarily follows that the only authorized purpose for any transfer is the provision of specialized treatment." *Id.* at 647. The Seventh Circuit also observed that the other federal statutes relating to prisons generally refer to these institutions as "penal and correctional institutions" rather than "treatment facilities." *See, e.g.*, 18 U.S.C. §4001(b)(1) (1976); *id.* §4081. In reaching its conclusion, the Seventh Circuit commented that "[w]e do not believe Section 5003 to be ambiguous." 581 F.2d at 647.

In *Howe v. Civiletti*, 625 F.2d 454 (2d Cir. 1980), the Second Circuit also considered the language of Section 5003 to be unambiguous,[3] but found it precluded

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3. "Our basis for rejecting Howe's argument [that Section 5003 restricts the availability of transfer to prisoners in need of treatment] is that it has no basis in the language of the statute." *Howe v. Civiletti*, 625 F.2d at 457.

the interpretation adopted by the Seventh Circuit in *Lono v. Fenton*. The Second Circuit was confronted in *Howe* with the precise issue presented in Beshaw's case: the legality under Section 5003 of the transfer of a Vermont state prisoner to federal custody pursuant to the agreement between Vermont and the Federal Bureau of Prisons, where it was not determined before transfer that the prisoner was in need of specialized treatment. In rejecting the argument that the statute's reference to "treatment facilities and personnel" was meant to foreclose transfers for purposes other than treatment, the Second Circuit declared: "More plausible than the argument that this phrase was intended to limit the use of the statutory program to persons in need of treatment is the explanation that the phrase simply names those institutions in terms of the most laudable (if, perhaps, least often realized) goal the institutions serve, namely, the reform of prisoners through treatment." 625 F.2d at 457-58. Other federal courts have concurred with the Second Circuit in interpreting Section 5003 as authorizing transfers from state to federal custody even when the transferred prisoner does not require special treatment available only at federal facilities.[4]

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4. *E.g.*, Sisbarro v. Warden, 592 F.2d 1 (1st Cir. 1979); Bowers v. Fenton, 488 F. Supp. 570 (M.D. Pa. 1979); Fletcher v. Warden, 467 F. Supp. 777 (D. Kan. 1979). No case has been brought to our attention from outside the Seventh Circuit which follows *Lono v. Fenton*.

The acceptance by both the First and Second Circuits of the interpretation of Section 5003 adopted in *Howe* presents a dilemma for Beshaw. Were this Court to adopt the statutory construction he urges, and to remand to the district court, that court would likely be confronted with a motion under 28 U.S.C. §1404(a) for transfer of the case either to Vermont, where Beshaw was convicted, or to Massachusetts, where he is presently confined. The district courts in either state would presumably be bound by the construction of Section 5003 adopted by their respective courts of appeal, and thus would be compelled to deny Beshaw the transfer back to Vermont state custody which he seeks.

We find that the language of Section 5003, construed in light of the legislative history of the provision, is best understood as not requiring a showing of need for specialized treatment before a transfer from state to federal custody may be authorized. The statute provides that the Attorney General can contract with appropriate representatives of the States "for the custody, care, subsistence, education, treatment, and training" of convicted persons. The purposes of the statute appear to include care, custody, subsistence, education and training as well as treatment, and we do not believe that this statutory language can fairly be read as requiring that any one of these purposes must be applicable to every case. While Section 5003 also states that transfers can take place only when the Director of the Bureau of Prisons certifies that "proper and adequate treatment facilities and personnel are available," we doubt that this clause can be interpreted as requiring any more than that federal facilities and personnel be adequate to handle any prisoners received; we do not find that it places a substantive restriction on the purposes for which prisoners may be transferred. *See Lono v. Fenton*, 581 F.2d at 649 (Bauer, J., dissenting).

The legislative history of Section 5003 suggests that Congress did not intend to authorize only those transfers prompted by a need for specialized treatment. When Section 5003 was enacted in 1952, the Attorney General had already been authorized by statute to contract with state officials for the care of *federal* prisoners by the states. 18 U.S.C. §4002 (originally enacted in 1930). State prisons for many years housed and cared for federal prisoners — until the federal government built its own institutions. *See* H.R. Rep. No. 1663, 82d Cong., 2d Sess. 2 (1952).

By 1952, enough federal facilities had been constructed that Congress believed that the federal government could now accommodate the states in the same manner that the states had previously accommodated

the federal government. This sentiment was expressed in a letter to the Congress from Peyton Ford, then Deputy Attorney General, which forms part of both the Senate Report, S. Rep. No. 978, 82d Cong., 1st Sess. (1951), and the House Report, H.R. Rep. No. 1663, 82d Cong., 2d Sess. (1952), on Section 5003: "Section 4002 of title 18, United States Code, authorizes contracts with the proper authorities of States, Territories, or political subdivisions thereof, for the imprisonment, subsistence, care, and proper employment of Federal prisoners. Pursuant to the authority of that section, there are approximately 3,000 Federal prisoners serving short sentences or awaiting trial in State, county, and city institutions. . . . There is no apparent reason why the Federal facilities and personnel, if available, should not be made available for State offenders, provided, of course, that the Federal government is reimbursed for any expenses involved." Section 4002 does not preclude transfers of federal prisoners for purposes other than treatment,[5] and we doubt that Section 5003, authorizing transfers of state rather than federal prisoners, can be so limited.

Beshaw points to the following language of the House Report as evidencing an intent to restrict the scope of Section 5003: "The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." H.R. Rep. No. 1663, *supra*, at 2.

While this passage would appear facially to support Beshaw's interpretation of Section 5003, we do not find

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5. 18 U.S.C. §4002 provides in pertinent part: "For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons."

it controlling. The House Report was published on March 27, 1952, five months after Section 5003 had already been passed by the Senate. *See* 97 Cong. Rec. 13543 (Oct. 19, 1951). No language similar to that which appears in the House Report is contained in the Senate Report. We believe that the more restrictive view of the bill represented by the quoted portion of the House Report cannot override the language of the statute itself as enacted by both Houses of Congress — language that authorizes transfers not merely for treatment, but for "custody, care, subsistence, education, treatment, and training."

As the contract between the Federal Bureau of Prisons and the State of Vermont illustrates, the Bureau has not construed Section 5003 as limiting the Bureau to accepting only those prisoners in need of specialized treatment. Inasmuch as the Bureau is the agency charged with the administration of the statute, its interpretation is entitled to considerable weight. *See United States v. National Association of Securities Dealers*, 422 U.S. 694, 718-19 (1975); *NLRB v. Bell Aerospace*, 416 U.S. 267, 274-75 (1974); *Udall v. Tallman* 380 U.S. 1, 16 (1964). In this case, moreover, the administrative interpretation of the Bureau is especially deserving of deference by the courts since it was the Bureau which drafted Section 5003, prompted its introduction in the Senate, and pressed it through Congress without relevant amendment or even much debate. *See Lono v. Fenton*, 581 F.2d at 649 (Bauer, J., dissenting).

We also note that Congress has had ample opportunity to express any dissatisfaction it might entertain regarding the Bureau's implementation of Section 5003. If its views were at odds with the construction given the statute by the Bureau of Prisons, Congress could be expected to have made some changes in the statutory language over the intervening quarter of a century since its

passage.[6] *See Fletcher v. Warden*, 467 F. Supp. 777, 781 (D. Kan. 1979).

Practical considerations also weigh in favor of the Bureau's interpretation of Section 5003. The Second Circuit observed in *Howe v. Civiletti, supra*, that a narrow construction of Section 5003 might work to the disadvantage of some prisoners: "Howe's view of the statute would mean that a wholly incorrigible, or on the other hand, fully rehabilitated prisoner, incarcerated not for treatment, but solely for purposes of deterrence, could not be transferred from state to federal custody solely to take advantage of training and educational opportunities available only at federal facilities." 625 F.2d at 457. Moreover, the interpretation urged by Beshaw would jeopardize longstanding contractual relationships between the Bureau and many states, and would occasion significant burdens for at least some states. After entering into an agreement with the Federal Bureau of Prisons in 1975, Vermont closed its only maximum security prison. To order that Beshaw be returned to state custody would, in effect, compel Vermont to reopen a state facility for maximum security prisoners or perhaps to build a completely new facility. In the absence of a clear legislative mandate, we are reluctant to render a decision that would so greatly interfere with a state's administration of its own correctional institutions.

We conclude that neither the statutory language nor the legislative history of Section 5003 compels an interpretation that would tolerate the transfer of a state

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6. Congress has altered §5003 in other respects: in 1965 the section was amended to define "State" as including "any State, territory, or possession of the United States, and the Canal Zone." Pub. L. No. 89-267, §1, 79 Stat. 990 (1965). The failure of Congress to alter the prerequisites for transfer is thus particularly telling. *See* Saxbe v. Bustas, 419 U.S. 65, 74 (1974) ("This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched.")

prisoner into federal custody only when the prisoner is in need of specialized treatment. Were we to accept the interpretation urged by Beshaw, we would thereby upset the construction adopted by the Federal Bureau of Prisons, left untouched by Congress, and supported by practical considerations.

C. *Due Process*

Before his transfer to federal custody, Beshaw was given a hearing before the Vermont Board of Corrections. Beshaw contends, however, that this hearing was inadequate to satisfy the requirements of due process because it did not "consider the impact of this transfer on [Beshaw] but [was] limited to security considerations created by the closing of the state's sole maximum security facility at Windsor, Vermont." Beshaw's principal complaint about the pre-transfer hearing — that there was no showing that Beshaw was in need of specialized treatment available only at federal facilities — is obviously foreclosed by the preceding discussion of Section 5003.

Beshaw also asserts that, as a result of his transfer into federal custody, liberty interests protected by the Fourteenth Amendment were infringed in that he was subjected to a set of prison rules and regulations different from those in effect in the Vermont State prisons, and was transferred a considerable distance from friends and family. He argues that the pre-transfer hearing was constitutionally inadequate because it did not consider the effect a transfer would have on these protected interests.

In light of *Meachum v. Fano*, 427 U.S. 415 (1976), we conclude that there is no merit to Beshaw's claim that his subjection to a set of prison rules different from those in effect in Vermont implicates a protected liberty

interest. In *Meachum*, the Court said: "We cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. . . . That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." *Id.* at 224-25. The Court declared that a due process liberty interest would be implicated only if state law provided the prisoner with an "entitlement" to remain in the prison to which he was assigned, defeasible only upon proof of specific acts of misconduct or the occurrence of other specific events. In the present case, Beshaw identifies no provision of state or federal law that confers on him an "entitlement" to remain in conditions of confinement substantially similar to those to which he was subject while incarcerated in Vermont. Absent such an entitlement, we are compelled to conclude that Beshaw's transfer to prisons where the applicable rules and regulations may have been less agreeable to him did not implicate a Fourteenth Amendment liberty interest.

Beshaw contends as well that his transfer to federal authority resulted in his being sent great distances from family and friends. Although we are concerned when prisoners are transferred under such circumstances, we are aware of no authority suggesting that a transfer to a facility not easily accessible to a prisoner's relatives and acquaintances necessarily implicates liberty interests protected by the Due Process Clause. No argument has been made, for example, that separation from family and friends constitutes a violation of the Eighth Amendment's prohibition against cruel and unusual punishment; nor has Beshaw pointed to any provision of Vermont law indicating that prisoners sentenced by Vermont courts are entitled not to be transferred

considerable distances from their place of original confinement.[7]

In the absence of any entitlement under either federal or state law, we are compelled by *Meachum* to find that Beshaw has not asserted a violation of a protected liberty interest. We note as well that the other federal courts that have considered the question found that a prisoner's due process rights are not implicated simply because he is transferred a considerable distance from his place of original incarceration. *See Ali v. Gibson*, No. 80-1189 (3d Cir. Sept. 30, 1980) (transfer from Virgin Islands to mainland United States); *Fletcher v. Warden*, 467 F. Supp. 777 (D. Kan. 1979) (transfer from Delaware to Kansas); *Shakur v. Bell*, 447 F. Supp. 958 (S.D.N.Y. 1978) (transfer from New Jersey to West Virginia).

D. *Access to State Courts*

Beshaw asserts that, by virtue of his transfer from Vermont, he has been denied access to the Vermont courts. This contention was originally raised in Beshaw's objections to the magistrates' report, wherein he maintained that he had no access to Vermont statutes, digests, or Supreme Court decisions, and that he was consequently disadvantaged in attempts to litigate his claims in Vermont courts. The district court did not ad-

7. Beshaw does have a right under Vermont law not to be transferred to a federal facility, however near it might be to his place of original confinement, unless at least one of three conditions is satisfied: (1) the prisoner needs particular treatment or special facilities available at the federal correctional facility; (2) all in-state security and custody alternatives for the inmate have been considered and found wanting; or (3) the inmate voluntarily requests transfer. 28 V.S.A. §706(a); *see* Gorouard v. Hogan, 135 Vt. 448, 378 A.2d 105 (Sup. Ct. 1977). At the pre-transfer hearing accorded Beshaw, it was determined that he was subject to transfer under condition (2). Beshaw does not challenge the validity of his transfer under state law.

dress this issue in its order denying the petition for a writ of habeas corpus.

Like all prisoners, Beshaw has a constitutional right of access to the courts. The Supreme Court, which has recognized such a right at least since *Ex parte Hull*, 312 U.S. 546 (1941), has required that access to the courts for criminal defendants be adequate, effective, and meaningful, *see Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1950). In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court considered whether the availability of legal materials was a component of the right of access to the courts. It held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 827.

The posture of the present case precludes us from deciding whether Beshaw's right to access has been abridged.[8] The district court made no findings on this issue. In his brief, Beshaw does no more than state in a conclusory fashion that, because of his transfers, "[h]e is under a disability . . . with regard to access to the state courts and an attorney familiar with Vermont law." Brief at 12. But we are given no indication of the manner in which Beshaw's rights have purportedly been abridged;

8. It is unclear from the record just what claim Beshaw is making with respect to the right of access. In his objections to the magistrate's findings, denial of the right of access is listed as an independent ground for granting habeas corpus relief. In Beshaw's brief, however, denial of the right of access is mentioned in connection with the asserted violations of due process. Beshaw thus appears to be claiming that the effect of the transfer on his access to the courts should have been considered at a hearing before he was placed in federal custody. Regardless of how the objection is framed, however, the record before us is insufficient for us to render a decision on the merits.

we are not told, for instance, whether he is currently without access to sources of Vermont law, whether he is denied all access to Vermont counsel, or even whether he is pursuing, or wishes to pursue, an appeal through the Vermont state courts.

In *Hohman v. Hogan*, 458 F. Supp. 669 (D. Vt. 1978), the district court considered a claim of denial of access raised by a prisoner who had been convicted in Vermont but transferred pursuant to §5003 to the United States Federal Penitentiary at Marion, Illinois. The court there ascertained that the facilities and programs available to the plaintiff were adequate to protect his right of access to the courts. Of particular significance were the services of the Vermont Public Defender. State prisoners in federal custody maintained communication with the Defender General's office by mail, limited telephone calls, and infrequent personal conferences. In addition, it was the practice and policy of the Vermont Department of Corrections, when time and other circumstances allowed, to return to Vermont prisoners who had been transferred to the federal prison system, when their presence was required in court proceedings. Pursuant to this policy, the plaintiff in *Hohman* had been returned to Vermont to consult with his counsel on his appeal to the Vermont Supreme Court. Although the library of the federal facility at Marion did not contain Vermont statutes or reporters, these materials were made available by the Vermont Law and Documents Library in Montpelier, Vermont, which conducted a program through which Vermont prisoners could obtain free legal materials wherever they were incarcerated.

There is in the record in the present case no indication whether the services made available by Vermont at the time of *Hohman* are still available to prisoners incarcerated out-of-state. Nor is there any basis on which we can properly determine whether, if available, these services would be adequate to ensure that a prisoner with Beshaw's particular needs would have meaningful ac-

cess to the courts of Vermont. Under these circumstances, we cannot say that the writ of habeas corpus should issue on grounds that Beshaw's right to access has been violated. In so deciding, however, we do not mean to prejudice any future efforts by Beshaw to seek relief on these grounds.

CONCLUSION

The judgment of the district court denying Beshaw's petition for a writ of habeas corpus will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

United States Court of Appeals
for the Third Circuit

No. 79-1777

Beshaw, Arthur Joseph,
Appellant

vs.

Fenton, Charles, Warden,
U.S. Pen. et al.

(D.C. Civil Action No. 79-0063)

ON APPEAL FROM THE
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge, ADAMS and
HIGGINBOTHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on October 6, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 9, 1979, be, and the same is hereby affirmed.

Attest:

/s/ Sally Mrvos
Clerk

December 15, 1980

No. 80-1315

APR 17 19
ALEXANDER L. S
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAWAII, VERMONT, DELAWARE AND ALASKA, PETITIONERS

v.

WILLIAM K. MEDERIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

WADE H. MCCREE, JR.
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HAWAII, VERMONT, DELAWARE AND ALASKA, PETITIONERS

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WILLIAM K. MEDERIOS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

The petitioning States seek review of the decision of the United States Court of Appeals for the Seventh Circuit reaffirming its en banc holding in *Lono* v. *Fenton*, 581 F. 2d 645 (1978), that 18 U.S.C. 5003(a) conditions the authority of federal officials to accept custody of state prisoners on a showing that the prisoners are in need of specialized treatment available only in the federal system, and further holding that prior to such a transfer there must be a federally conducted hearing accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972)) in order to determine the need for specialized treatment and how it could be met in the federal system. Because these same questions are already before the Court in *Howe* v. *Smith*, petition for cert. granted, No. 80-5392 (Jan. 26, 1981) (argument scheduled for Apr. 28, 1981), we submit that the Court should hold the instant petition pending its decision in *Howe* v. *Smith*.

1. Following their convictions and incarceration for various offenses in five different states—Vermont, Alaska, Hawaii, Delaware and New Mexico[1]—the 12 prisoner respondents were transferred from state to federal custody because of their need for maximum security incarceration and/or protective custody, which the States could not provide. The transfers were carried out pursuant to contracts entered into between the federal and respective state governments under 18 U.S.C. 5003(a). Pet. App. A-4 to A-5 & n.3.[2] Although some of the prisoners were afforded state-conducted pre-transfer hearings (Pet. App. A-5 to A-9 & nn. 4-9), no hearings were provided by the federal government.

The 11 prisoner respondents who were incarcerated in the United States Penitentiary at Marion, Illinois, filed petitions for writs of habeas corpus in the United States District Court for what is now the Southern District of Illinois.[3] They named as respondent George C. Wilkinson, Warden of the Marion Penitentiary, and alleged that their transfers from state to federal prison because of insufficient state maximum security facilities were invalid under 18 U.S.C. 5003(a), as construed by the en banc Seventh Circuit in *Lono* v. *Fenton, supra*. The United States Magistrate granted motions to intervene filed by Vermont's Commissioner of Corrections and the States of Hawaii, Alaska and

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[1]The State of New Mexico has never intervened in these proceedings.

[2]18 U.S.C. 5003(a) provides in pertinent part:

> The Attorney General, when the Director [of the Federal Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory * * *.

[3]The same area previously was designated the Eastern District of Illinois.

Delaware, and held individual hearings on each prisoner's petition. He consolidated the cases, however, for the purpose of his report (Pet. App. A-9 & n.10, A-38 to A-55), in which he stated that while he disagreed with the *Lono* court's construction of 18 U.S.C. 5003(a), he was bound by it; accordingly, he recommended "with reluctance" that the petitions be granted and that unless the prisoners were returned to their respective state correctional systems within 30 days writs of habeas corpus should issue and the prisoners be discharged (Pet. App. A-55). The district court, deeming itself "constrained to follow the law as set out by the Court of Appeals for the Seventh Circuit," adopted the magistrate's report and recommendation "with grave reservations" (*id.* at A-62). The district court stayed its order pending appeal (*id.* at A-9).

Respondent Lawrence, who was incarcerated in the Federal Correctional Institution at Oxford, Wisconsin, filed a similar petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin, naming Robert I. Elsea, Warden of the Oxford Correctional Institution, as respondent. That district court also granted a motion to intervene by the Commissioner of Corrections of Vermont (Pet. App. A-9 to A-10 & n.11). Then, deeming itself "bound by the Seventh Circuit's decision in *Lono*" (*id.* at A-74; footnote omitted), the court granted the petition without an evidentiary hearing, ordering that Lawrence be returned to Vermont's correctional facilities within 30 days or be discharged from custody (*id.* at A-76).[4] Although the district court denied the state intervenor's motion to stay the order pending appeal, the court of appeals granted a stay (Pet. App. A-10).

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[4]Lawrence's case was decided together with the cases of two other Oxford prisoners who, rather than petitioning for writs of habeas corpus, had filed civil actions in mandamus under 28 U.S.C. 1651, also

On appeal by the federal wardens and the intervening state parties, Lawrence's case was consolidated with those from the Southern District of Illinois. In its decision, the Seventh Circuit adhered to the *Lono* view that 18 U.S.C. 5003 "requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system" (Pet. App. A-11), observing that "principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in *Lono*" (Pet. App. A-13; footnote omitted). The court of appeals recognized, however, that transfers based on security considerations may satisfy the "specialized treatment" requirement of *Lono* "if a sufficient array of programs is provided in connection with incarceration in a maximum security prison" (Pet. App. A-17). Nonetheless, the court of appeals held that the transfers at issue were impermissible because the prisoners had not been accorded due process.[5] Contrasting the discretionary transfer of prisoners within a particular system upheld by this Court in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), with the state-to-federal transfers authorized by 18 U.S.C. 5003, the court of appeals found (Pet. App. A-21) that Section 5003 creates in state prisoners "a

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seeking relief from federal custody. The district court treated the mandamus actions as if they had been brought as habeas corpus actions (Pet. App. A-64) and granted the same relief to those prisoners as it granted Lawrence (*id.* at A-76). Thereafter, however, while the federal warden and the state intervenor appealed the decision in Lawrence's case, the district court granted the government's motion to reconsider the two mandamus actions. After reconsideration, the district court again granted the relief requested by the two prisoners. That decision was also appealed to the Seventh Circuit, where it is currently pending. *Mulholland* v. *Elsea*, Nos. 80-1780, 80-1567, and *Wetmore* v. *Elsea*, Nos. 80-1781, 80-1697 (filed June 5, 1980).

[5]In *Lono*, the court had found it unnecessary to decide what process was due a state prisoner prior to his transfer to the federal system (581 F. 2d at 646).

liberty interest deserving of due process protection." Accordingly, the court held that "there must be a federally conducted hearing" (Pet. App. A-27 to A-29), accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972)), in order to determine "the need for specialized treatment and * * * how it could be met in the federal system" (Pet. App. A-26).[6]

2. The decisions of the Seventh Circuit in *Lono* and in the present case squarely conflict with the decisions of every other court of appeals that has considered the construction of 18 U.S.C. 5003(a). *Fletcher* v. *Warden*, Nos. 79-1156, etc. (10th Cir. Feb. 13, 1981); *Beshaw* v. *Fenton*, No. 79-1777 (3d Cir. Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981); *Howe* v. *Civiletti*, 625 F. 2d 454 (2d Cir. 1980), cert. granted *sub nom. Howe* v. *Smith*, No. 80-5392 (Jan. 26, 1981) (argument scheduled for Apr. 28, 1981); *Sisbarro* v. *Warden*, 592 F. 2d 1 (1st Cir.), cert. denied, 444 U.S. 849 (1979). Despite this conflict, however, we believe that it is unnecessary for the Court to grant the petition for a writ of certiorari at this time.

The first issue presented by the instant petition—whether 18 U.S.C. 5003(a) conditions the authority of federal officials to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system—is already before the Court in *Howe* v. *Smith*, *supra*. If the Court in *Howe* agrees with us that that question should be answered in the negative,

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[6]On February 27, 1981, the court of appeals denied the federal government's petition for rehearing, which had requested the court to delay final decision in the case until this Court's decision in *Howe* v. *Smith*. The petitioning States have filed a motion, in which the federal government has joined, to stay the mandate of the court of appeals pending this Court's action on their petition for a writ of certiorari. The Seventh Circuit has not yet acted on that motion.

there will be no need for consideration of the due process issue. In the alternative, if the Court in *Howe* should find that the federal government's authority to accept state prisoners is not unconditional, it may then consider the due process issue, which has been briefed by the parties.[7] In the event that its decision in *Howe* does not dispose of all of the questions raised by the instant case, the Court can determine at that point whether the remaining questions merit its plenary consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held for disposition as appropriate in light of this Court's decision in *Howe* v. *Smith*, *supra*.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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[7]Although the petitioner in *Howe* did not raise the due process issue in the lower courts and although we do not view it as "fairly included" in the question presented in that case (see Rule 21.1(a) of the Rules of this Court), the Court may wish to decide the issue in the interest of judicial economy, since it is presented not only in the instant case, but in *Beshaw* v. *Fenton*, *supra*, as well.